No. 90-76

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN JUZWIN, *et ux.*,

Petitioners,

—v.—

ASBESTOS CORPORATION, LTD., *etc.*, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CAREY CANADA, INC.

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below included:

1) Carey Canada, Inc. (defendant-appellant below) [incorrectly listed in the petition as "Carey Canadian Mines];
2) Stephen Juzwin and Mary Juzwin, his wife (plaintiffs-appellees below);
3) The State of New Jersey (intervenor below);
4) Amtorg Trading Corp. (defendant-appellee below);
5) Asbestos Corp., Ltd. (defendant-appellee below);
6) Bell Asbestos Mines, Ltd. (defendant-appellee below);
7) Flintkote Mines, Ltd. (defendant-appellee below);
8) Metropolitan Life Insurance Co. (defendant-appellee below);
9) Leonard J. Buck, Inc. (third-party defendant-appellee below).
10) Wilentz, Goldman & Spitzer, P.C. (counsel for *amicus curiae* below).

Four corporations listed in the petition were parties to the proceedings in the district court, but were not parties to the proceedings in the court of appeals: a) Turner & Newall, P.L.C. (third-party defendant), b) National Gypsum Co. (third-party defendant), c) Lac D'Amiante du Quebec Limitee (defendant), d) Associated Ore & Metal Corp., Ltd. (fourth-party defendant).

Pursuant to Rule 29.1 respondent Carey Canada, Inc. states that its parent company is The Celotex Corporation. (The Celotex Corporation's parent is Jim Walter Corporation). Respondent has no affiliates or other than wholly owned subsidiaries.

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IN THE

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OCTOBER TERM, 1990

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STEPHEN JUZWIN, *et ux.*, *Petitioners,*

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ASBESTOS CORPORATION, LTD., *etc.*, *et al.*, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CAREY CANADA, INC.

Respondent Carey Canada, Inc. [hereinafter "Carey Canada"] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Third Circuit's decision in this matter.

OPINIONS BELOW

Although the petition correctly notes the citation for the court of appeals' reported decision below, this respondent wishes to add that the district court opinion it reversed is not published and bears a different caption: *Juzwin v. Amtorg Trading Corp.*, Civil No. 87-3876, slip op. (D.N.J. opinion filed February 28, 1989) (reprinted in the appendix to the

petition[1] at 27a). Two other district court opinions in the case were published, but they concern issues unrelated to those raised in the petition.[2]

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

This case involves the constitutionality of the New Jersey "tolling statute," N.J. Stat. Ann. § 2A:14-22 (West 1987),[3] which provides, *inter alia*, that the statute of limitations applicable to a plaintiff's claim will toll—that is, cease to run—as to a defendant foreign corporation (not organized under the laws of New Jersey) during the time it is not "represented" within the state. For purposes of the tolling statute, a foreign corporation not "represented" within the jurisdiction "by any person or officer upon whom summons or other original process may be served," will be "deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." N.J. Stat. Ann § 2A:14-22. Since respondent Carey Canada was "formed under the laws of Canada, has no corporate offices in the

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1 Hereinafter citations to the appendix to the petition will be stated as: "Pet. App. _____a"; citations to the petition itself will be stated as: "Pet. _____."

2 The petition addresses the validity of the New Jersey "tolling statute" under the Commerce Clause of the United States Constitution; the two published district court opinions concern the constitutionality of punitive damages: *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989). Unfortunately, in preparing the reported version of the Third Circuit opinion below striking the New Jersey tolling statute on commerce clause grounds, West Publishing Co. erroneously replaced citations to the district court's unpublished tolling statute opinion with citations to one of the district court's reported punitive damages opinions. See *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 688 (3d Cir. 1990) (citing 705 F. Supp. 1053, 1055).

3 Pet. App. 6a. Hereinafter cited without parenthetical reference to publisher and date.

state of New Jersey, has never been registered to do business there, and has not appointed an agent for service of process with the Secretary of State . . . it is not 'represented' in New Jersey within the meaning of the tolling statute." *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 688 (3d Cir. 1990). Pet. App. 7a. It is this provision regarding designation of an agent to accept service of process[4] which presented the issue litigated below.

The relevant provision of the tolling statute was added to the "current" tolling statute[5] in 1984 in an attempt to cure a constitutional defect responsible for the predecessor statute's invalidation by both state[6] and federal courts.[7]

B. The Facts

On or about July 24, 1987, petitioners Stephen Juzwin and Mary Juzwin, his wife, filed an action in the Law Division of the Superior Court of New Jersey alleging that Stephen

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4 "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." Pet. App. 6a.

5 Except for the addition of the relevant provision set forth in the preceding note *supra*, the "current" tolling statute stricken by the decision below is identical to the "predecessor" tolling statute.

6 In *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) [hereinafter "*Coons I*"], *modified*, 96 N.J. 419, 476 A.2d 763 (1984) [hereinafter "*Coons II*"], *cert. denied*, 469 U.S. 1123 (1985), the New Jersey Supreme Court held that by requiring a foreign corporation to obtain a "certificate of authority" to do business in New Jersey in order to achieve "representation" and realize the benefits of the statute of limitations, the predecessor tolling statute amounted to a "forced licensure provision" which unconstitutionally burdened interstate commerce. *Id.* at 318, 463 A.2d at 927. In *Coons II* the court held that its *Coons I* ruling should be applied prospectively. [Hereinafter, where appropriate, the *Coons* opinions will be cited without subsequent history].

7 *Cohn v. G.D. Searle & Co.*, 598 F. Supp. 965 (D.N.J. 1984) (striking statute on commerce clause grounds and applying decision retroactively), *reversed in part and remanded*, 784 F.2d 460 (3d Cir.) (requiring prospective application), *cert. denied*, 479 U.S. 883 (1986). [Hereinafter, where appropriate, opinions in the *Cohn* line of decisions from 1978 to 1986 will be cited without subsequent history].

Juzwin [hereinafter "Juzwin"] developed a pulmonary condition as a result of his exposure to various asbestos-containing products manufactured or supplied by the defendants. Among the defendants named in the complaint was respondent Carey Canada, a corporation organized under the laws of Canada.

Upon application of defendant Amtorg Trading Corporation, the action was removed to the United States District Court for the District of New Jersey, where jurisdiction was based upon diversity of citizenship.[8]

During the course of discovery, plaintiffs supplied answers to interrogatories admitting that Juzwin knew that he had been diagnosed as having an asbestos-related condition on or about August 16, 1982.[9] Moreover, on June 7, 1982—several months before he learned of that diagnosis—Juzwin, represented by counsel, filed a Workers Compensation action for the same type of condition at issue in the instant case and subsequently collected benefits.[10] Since plaintiffs' action was not filed within two years of his diagnosis as required by the applicable statute of limitations governing personal injury claims, N.J. Stat. Ann. § 2A:14-2 (West 1987), defendant Carey Canada moved for dismissal of plaintiffs' complaint on that ground, arguing that the New Jersey tolling statute was invalid under the Commerce Clause of the United States Constitution and therefore could not operate to toll the run-

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8 To assist the Court and petitioner with respect to Rule 14.1(i), Carey Canada notes that jurisdiction in the district court was predicated upon diversity of citizenship pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1332(c). The amount in controversy was alleged to exceed $10,000.

9 See Joint Appendix in *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d. 686 (3d Cir. 1990) at pages 11 and 16c. [Hereinafter citations to the Joint Appendix before the Third Circuit will be stated as "Jt. App. _____"]. See also the opinion of the district court below at Pet. App. 29a-30a.

10 See Plaintiffs' Answers to Part I Interrogatories, response to I.27 attaching "Employee's Claim Petition," No. 82-16872 (filed June 2, 1982 with the Division of Workers Compensation, Department of Labor and Industry, State of New Jersey), as well as two "Order[s] Approving Settlement With Dismissal." (Discussed in Carey Canada's opening brief to the Third Circuit at page 6).

ning of the limitations period. Carey Canada also requested that the decision striking the tolling statute be applied retroactively. Pet. App. 28a; Jt. App. at 16.

Although Carey Canada, a Canadian corporation, has been joined as a defendant in numerous federal and state actions in New Jersey over the past eight or more years, it is not "represented" in the jurisdiction for tolling statute purposes. See Preliminary Statement *supra*. Furthermore, since Carey Canada sold its asbestos fiber "F.O.B. Quebec, Canada,"[11] it did not conduct its business operations in the United States.

The district court upheld the constitutionality of the tolling statute, denied Carey Canada's motion, and certified the tolling statute issue for interlocutory appeal under 28 U.S.C. § 1292(b). The Third Circuit granted Carey Canada permission to appeal and reversed, holding that the tolling statute impermissibly burdened interstate commerce. Furthermore, the Third Circuit, speaking through the Honorable Collins J. Seitz, C.J., held that its decision striking the tolling statute should be retroactively applied. *Juzwin*, 900 F.2d 686, 696 (3d Cir. 1990). Pet. App. 1a, 26a.

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11 Carey Canada's Answers to Interrogatories at A.4. (Discussed in Carey Canada's opening brief to the Third Circuit at 7). A "Free on Board" point of origin contract requires the seller to put his goods in the possession of the carrier at that location. See U.C.C. §§ 2-319 and 2-504.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THE LAW OF NEW JERSEY AND THE NEW JERSEY APPELLATE COURTS ARE CURRENTLY CONSIDERING WHETHER TO FOLLOW THAT DECISION

A. New Jersey Law Does Not Provide for the "Saving Construction" of the Tolling Statute Urged by Petitioners

One of the principal arguments advanced by petitioners for grant of certiorari in the case at bar is that the Third Circuit disregarded a "saving construction" of the tolling statute adopted by New Jersey state courts. See, e.g., Pet. at 4, 6, 7, 12, 13, 14 and 24. In support of this argument, petitioners cite the unpublished summary affirmance of the New Jersey Superior Court, Appellate Division in *Armenti v. Carey Canada, Inc.*,[12] and a district court opinion, *Cutler v. Raymark Industries, Inc.*, 707 F. Supp. 168 (D.N.J. 1989), which was overruled[13] by the Third Circuit decision at bar.

Contrary to petitioners' assertions, neither the bench opinions rendered by Law Division Judges Keefe and Mannion,[14] nor the order of the Appellate Division (Pet. App. 47a) constitutes precedent "binding upon any court" since those deci-

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12 *Armenti v. Carey Canada, Inc.*, No. L-045449-87 (N.J. Super. Ct. Law Div. Middlesex County), *aff'd without opinion*, No. 177-88T3F (N.J. Super. Ct. App. Div. order filed Nov. 7, 1988).

13 In *Cutler*, the district court upheld the same tolling provision at bar in *Juzwin* against a commerce clause challenge.

14 The two bench opinions are reprinted in the appendix to this brief at 1a and 23a, respectively. [Hereinafter citations to the appendix to this brief will be stated as: "Brief App."].

sions were not approved for publication pursuant to N.J. Court R. 1:36-3.[15]

Furthermore, this respondent respectfully maintains the decisions in *Armenti* cannot serve even as persuasive authority regarding the statutory construction and commerce clause issues raised by petitioner. Both the initial trial court bench opinion, rendered before this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), and the second trial court bench opinion rendered thereafter pursuant to defendants' motion for rehearing, are marred by erroneous interpretations of significant issues.[16] The Appellate Division's order in *Armenti* cannot serve as a greater source of persuasive authority since it "summarily affirm[s] the Law Division's ruling "for the reasons expressed in the September 16, 1988 oral opinion of Judge Mannion which effectively supplemented the May 27, 1988 oral opinion of Judge Keefe." Pet. App. 47a.

A review of petitioners' other arguments in support of the "saving construction" reveals the weakness of their position. As in the proceedings below, petitioners maintain that the New Jersey tolling statute is valid since, unlike the Ohio tolling provision invalidated by this Court's decision in *Bendix*, 486 U.S. 888 (1988), the New Jersey enactment permits out-of-state corporations not registered to do business in New Jersey to obtain the protection of the statute of limitations by

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15 That rule provides: "No unpublished opinion shall constitute precedent or be binding upon any court. Except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of his client." *Id.*

16 For example, Judge Keefe stated that the enactment did not unduly burden interstate commerce on the theory that since it pertains to both individuals and corporations it is "not aimed simply at commerce conduct." Brief App. 19a. Regarding Judge Mannion's bench opinion, this respondent respectfully maintains that undue weight was given to the New Jersey legislature's perceived desire to create a constitutional statute. See Brief App. at 39a.

designating a representative for service of process whose authority is limited to causes of action as to which the corporation has a "nexus" with New Jersey, *i.e.*, the minimum contacts necessary for *in personam* jurisdiction under the Due Process Clause of the Fourteenth Amendment. See, e.g., Pet. at 5.

Although nothing in the wording of the New Jersey tolling statute suggests that it permits the appointment of an agent for service of process whose authority is limited to minimum contact causes of action,[17] proponents of the statute in the proceedings below argued that the absence of language prohibiting such appointments permitted the federal courts to perform "judicial surgery" and read in such a provision. The argument that a judicial interpretation of the New Jersey tolling statute may ignore the plain meaning of the enactment to avoid an unconstitutional result conflicts with the sound legal principle that a court cannot substitute its judgment for that of the legislature by rewriting a statute.[18]

Petitioners' limited designation argument is also undercut by New Jersey decisional law that designation of an agent to accept service of process subjects a corporation to the general jurisdiction of the forum.[19]

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17 The statute flatly states that: "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." N.J. Stat. Ann. § 2A:14-22.

18 *See, e.g., Badaracco v. Commissioner*, 464 U.S. 386 (1984) (courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement); *Harmon v. Phillips Petroleum Co.*, 555 F. Supp. 447 (D. Mont. 1982) (court cannot substitute its judgment for that of the legislature or insert what it deems has been omitted).

Unlike the excision of a severable unconstitutional provision, the task urged by proponents of the "limited designation" argument would require a court to traverse the boundaries between the judicial and legislative branches of government and engage in the quintessentially legislative function of formulating a new statute.

19 *See, e.g., Allied-Signal, Inc. v. Purex Industries, Inc.*, 242 N.J. Super. 362, 576 A.2d 942 (N.J. Super. Ct. App. Div. 1990). In *Allied*, plain-

In support of their argument that the New Jersey tolling statute permits the filing of limited designations, petitioners also refer to the affidavit of Paul E. Wermuth, an attorney for the New Jersey Secretary of State. Pet. at 12-13 & n.6. In that affidavit, Mr. Wermuth, relying upon unpublished "advice of the New Jersey Attorney General" rather than a formal opinion from that official, maintains that the Secretary of State permits the "filing of designations by unregistered, foreign corporations of representatives for service of process only with respect to causes of action which have the minimum contacts for due process purposes in this State. Such designations are recorded by this office and insulate foreign corporations filing such designations from causes of action which have no nexus with New Jersey."[20]

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tiff served its complaint on Purex's registered agent for service of process appointed pursuant to N.J. Stat. Ann. § 14A:4-1 and -2 (West. Supp. 1990). [Reprinted at Pet. App. 56a-58a]. The "only question" on appeal was whether plaintiff obtained personal jurisdiction over Purex by virtue of that service. 576 A.2d at 943. "Purex contended that, while it owned real property here, registering its agent for process was only related to New Jersey environmental litigation stemming from its predecessor's activities," and that "it had effectively left the State for purposes of Allied's action." *Id.* Rejecting Purex's limited designation argument, the court stated: "We know of no New Jersey or Supreme Court authority for the proposition that a corporation may limit a state's jurisdiction in the manner Purex suggests and none has been cited to us. Moreover, Purex asserts no limiting action on its part in the appointment process under N.J.S.A. 14A:4-2." *Id.* Drawing on *Burnham v. Superior Court of California, County of Marin*, 110 S. Ct. 2105 (1990), the court held that service on Purex's registered agent conferred personal jurisdiction over that firm "regardless of the nature of the litigation." 576 A.2d at 945.

20 "Affidavit of Paul E. Wermuth" dated September 8, 1988 at paragraph 5. [The affidavit is reprinted in the appendix hereto at Brf. App. 45a.] The affidavit bears the caption of, and is discussed in, *Robinson v. Visual Packaging, Inc.*, 705 F. Supp. 216, 220 (D.N.J. 1989) (rejecting limited designation argument and striking tolling statute under commerce clause). Although the proponents of the tolling statute referred to the affidavit in making their "limited designation" argument, the document was not filed with the clerk of the district court in the proceedings below. Nevertheless, the

Since the Wermuth affidavit is by no means a controlling interpretation of the tolling statute,[21] in the absence of a binding state court precedent the Third Circuit was free to construe the statute in a manner consistent with its plain meaning and reject petitioners' limited designation argument. Indeed, a district court which struck the tolling statute on commerce clause grounds prior to the Third Circuit's ruling below did exactly that.[22]

B. The New Jersey Superior Court, Appellate Division Is Currently Reviewing the Commerce Clause Issue Decided by the Third Circuit

One of the most obvious and compelling reason for denying the writ is the fact that the Appellate Division of the Superior Court of New Jersey is currently considering whether to follow the Third Circuit's opinion in *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir. 1990).

In *DiFalco v. Subaru of America, Inc.*, the Appellate Division of the New Jersey Superior Court recently granted a defendant's motion for leave to appeal to consider whether the New Jersey tolling provision stricken in *Juzwin* violates the Commerce Clause of the United States Constitution.[23]

Third Circuit considered the affidavit and permitted its filing in the supplemental appendix of the intervenor, the State of New Jersey.

The Wermuth affidavit does not indicate when the Secretary of State initiated the informal administrative practice of accepting limited designations. Brf. App. 45a.

21 *Service Armament Co. v. Hyland*, 70 N.J. 551, 561, 362 A.2d 13, 19 (1976) (" 'An appellate tribunal is . . . in no way bound by [an] agency's interpretation of a statute . . . .' ") (quoting *Mayflower Securities Co. v. Bureau of Securities*, 64 N.J. 85, 93, 312 A.2d 497, 501 (1973)).

22 *Robinson v. Visual Packaging, Inc.*, 707 F. Supp. 216, 220 (D.N.J. 1989).

23 In *DiFalco*, defendant Takata Corporation, a Japanese enterprise not "represented" within New Jersey for purposes of the tolling statute, moved for summary judgment on the ground that plaintiff's action was not filed within the two-year limitations period provided by N.J. Stat. Ann.

Even if New Jersey's Appellate Division does not reach the commerce clause issue in *DiFalco*,[24] grant of certiorari still would not be appropriate in the case at bar since there are a number of "tolling statute" motions pending in the New Jersey state trial courts which provide an opportunity for review of that issue by New Jersey's appellate courts.[25]

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§ 2A:14-2 (West 1987). Relying on the Third Circuit's decision in *Juzwin*, Takata argued that the tolling statute could not be invoked to extend plaintiff's time since the statute is invalid under the Commerce Clause. Both plaintiff and the State of New Jersey as intervenor opposed the motion on the ground that the Law Division should uphold the constitutionality of the tolling statute despite the Third Circuit's decision in *Juzwin*. The trial court trial heard argument on June 15, 1990 and denied Takata's motion "for the reasons stated by the Deputy Attorney General." Transcript of Proceedings at page 30, lines 23-24. That ruling was memorialized by order dated June 21, 1990. Brief App. 49a. Defendant Takata then filed a motion for leave to appeal with the Appellate Division of Superior Court which by order dated August 6, 1990, agreed to review the trial court's order. Brief App. 41a. See also Brief App. at 43a (scheduling order).

24 Based upon this respondent's review of available briefs in that case, it appears that the plaintiff resisted Takata's trial court motion on two grounds: 1) the validity of the tolling statute and 2) a state procedural law argument that her amended complaint against Takata should "relate back" to the filing of her original complaint (naming other defendants) so as to be deemed timely.

25 Counsel for respondent Carey Canada represents defendants in a considerable number of pending state court actions in which the tolling statute issue is potentially outcome determinative and virtually certain to be appealed no matter which side prevails. If a particular state trial court judge upholds the tolling statute and denies our defendant's statute of limitations motion, that defendant will appeal to the Appellate Division. If that state trial court finds the tolling statute invalid under the commerce clause, either plaintiff or the State of New Jersey—which intervenes in such actions to defend the tolling statute—is quite likely to appeal. (Pursuant to N.J. Court. R. 4:28-4(a)-(d), a litigant "question[ing]" the "validity of a statute, executive order, franchise, or constitutional provision of [the State of New Jersey]" in an action to which the state is not a party, must notify the Attorney General who may intervene to defend the statute. In the district court proceedings in the case at bar, the State of New Jersey intervened pursuant to the analogous federal statute, 28 U.S.C. § 2403(b)).

Thus it would be an unnecessary departure from this Court's established practice to devote resources to the resolution of an illusory conflict between that intermediate state appellate court[26] and the court of appeals when the former may, within the next few weeks or months, choose to follow the Third Circuit's decision below. See Rule 10(b).

C. The Third Circuit Utilized Petitioners' "Saving Construction" in Striking the Tolling Statute on Commerce Clause Grounds

This respondent is obligated by Rule 15.1 to point out that the Third Circuit did not ignore the "saving construction" urged by petitioners below.

Petitioners argue that the Third Circuit "abandoned the principle that unnecessary constitutional adjudication should be avoided if a statute can fairly be given a constitutional interpretation" by refusing to employ the "limited designation" construction described above under Point IA. See Pet. at 4; 6-7; 12 & n.6; 14. Contrary to petitioners' assertions, the Third Circuit expressly stated that it evaluated the constitutionality of the tolling statute in accordance with the limited designation argument urged by petitioners and adopted by the district court below.

> The district court concluded that, unlike the Ohio statutory scheme, the New Jersey tolling statute does not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The court noted the Secretary of State's practice of accepting des-

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Two state court cases in which counsel for respondent Carey Canada soon expects decisions on the constitutionality of the tolling statute are: *Leogrande v. Keene Corp.*, No. W-026197-87 (N.J. Super. Ct. Law Div. Middlesex County) (motion of defendant Pittsburgh Corning returnable September 14, 1990); *Anderson v. Owens-Corning Fiberglas Corp.*, No. W—012500-89 (N.J. Super. Ct. Law Div. Middlesex County).

26 See discussion of the New Jersey Superior Court, Appellate Division's unpublished summary affirmance in *Armenti* under Point IA *supra*.

> ignations of a representative for service of process only for causes of action having a nexus with New Jersey. Such a limited designation, the court held, imposed no unconstitutional burden on interstate commerce.
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> II. As we read *Bendix*, the New Jersey tolling statute would be invalid if it were applied to all foreign corporations, regardless of their connection with New Jersey. However, we will assume without deciding that the New Jersey Supreme Court would interpret the statute to permit designation of an agent for service of process only for causes of action having a nexus with New Jersey. The issue then become whether the statute so interpreted still constitutes an impermissible burden on interstate commerce.

Juzwin v. Asbestos Corp., Ltd., 900 F.2d 686, 689 (3d Cir. 1990). Pet App. 7a-8a. The concluding paragraph of Judge Seitz's commerce clause discussion also notes that the "limited designation" construction of the tolling statute was utilized: "Thus, even with a limiting construction, N.J. Stat. Ann. § 2A:14-22 violates the commerce clause under either [the heightened scrutiny or balancing] test since a nondiscriminatory procedure, less burdensome to interstate commerce, could be adopted by New Jersey." *Id.* at 692. Pet. App. 14a-15a.

Even if one were inclined to accept petitioners' suggestion that the Third Circuit merely "purported" to utilize the saving construction while actually evaluating the statute on the premise that it did not permit foreign corporations to file limited designations,[27] one must note that the court of appeals would have been within its rights in doing so since petitioners' construction is at variance with the plain meaning of the statute and not supported by any binding state precedents. See Point IA *supra*.

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27 See, e.g., Pet. at 4.

II.

THE THIRD CIRCUIT'S DECISION STRIKING THE NEW JERSEY TOLLING STATUTE UNDER THE INTERSTATE COMMERCE CLAUSE IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS

A. Heightened Interstate Commerce Clause Scrutiny Is The Appropriate Standard of Review for the Tolling Provision at Bar

Petitioners raise a number of objections to the Third Circuit's resolution of the commerce clause issue. Initially, petitioners complain that the New Jersey tolling provision should not have been reviewed under the "heightened scrutiny" interstate commerce clause standard. See Pet. at 15-17. Petitioners begin their argument with the unusual assertion that "[j]udicial review of state statutes challenged under the Commerce Clause are governed by a two-track standard, similar to the two-tiered scrutiny of the Equal Protection Clause."[28]

Petitioners claim that the "sole basis for the [Third Circuit's] application of the heightened scrutiny standard was its erroneous conclusion that the statute on its face, 'applies to out-of-state corporations but not to New Jersey corporations.' 900 F.2d at 689 and n.3 (9a)."[29]

Contrary to petitioners' assertion, the tolling statute provision at issue in the case at bar—the one which permits "cor-

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28 See Pet. at 15. Respondent Carey Canada understands there are three basic levels of review under the equal protection clause (strict scrutiny, intermediate tier review typically employed in gender discrimination cases, and rational basis review) and three basic standards of review under the commerce clause. *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 14.3 at 528-33 (3d ed. 1986) (regarding equal protection). A brief discussion of the three standards of commerce clause review appears in the Third Circuit's opinion below. *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 689 (3d Cir. 1990). Pet. App. 8a.

29 Pet. at 16. Petitioners buttress this argument with the assertion that since the tolling statute has provisions applicable to individual "citizens" of New Jersey who temporarily leave the state, it is a facially neutral, nondiscriminatory enactment. See Pet. at 16-17.

porations" to achieve representation by designating an agent for service of process[30]—applies exclusively "to out of state corporations but not to New Jersey corporations. . . ." *Juzwin*, 900 F.2d 686, 689 [footnote omitted]. As the Third Circuit noted: "The critical words are 'any corporation or corporate surety not organized under the laws of this State.' " *Juzwin*, 900 F.2d at 689, n.3 (quoting N.J. Stat. Ann. § 2A:14-22). Since the New Jersey tolling provision is facially discriminatory, the heightened scrutiny test is appropriate:

> Statutes which discriminate on their face or in their plain effect against interstate commerce are subject to heightened scrutiny. This heightened scrutiny places the burden on the state to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."

Old Coach Development Corp. v. Tanzman, 881 F.2d 1227, 1231 (3d Cir. 1989) (citations omitted) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

Also unpersuasive is petitioners' argument that the tolling statute should be deemed "a facially neutral, nondiscriminatory enactment" in the case at bar since it also tolls the statute of limitations with respect to individuals who leave the state. Even if one could accept the premise that the existence of a distinct provision depriving individuals of a limitations defense justified the discrimination between foreign and domestic corporations, a binding New Jersey state trial court precedent has stricken the tolling statute on commerce clause grounds with respect to a nonresident individual. *Crespo v. Stapf*, 242 N.J. Super. 254, 576 A.2d 346 (N.J. Super. Ct. Law Div. 1990).

In *Crespo*, plaintiff brought a product liability action alleging personal injuries attributable to a machine supplied by defendant Stapf, a resident of Germany who operates his

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30 The only provision relevant to the case at bar is contained in the final paragraph of the statute: See Pet. App. 6a, or see n. 4 *supra*.

unincorporated business in that nation. The court, reviewing the relevant provision[31] under a balancing test,[32] held the statute unduly burdensome of interstate commerce since "the only method by which a nonresident individual may receive the protection of our statute of limitations is to become a resident of this state." *Id.* at 260, 576 A.2d at 348. "A state 'may not condition this exercise of the defense (of the statute of limitations) on the relinquishment of rights that the foreign . . . (defendant) would otherwise retain.' Among the rights a foreign defendant would retain is the right to choose his residence, and in particular, to choose not to be a resident of this State." *Id.* at 260, 576 A.2d at 349 (citation omitted) (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988)).

Petitioners' next argument against application of strict interstate commerce clause scrutiny is based on the premise that since corporations organized under the laws of New Jersey (as well as those foreign corporations licensed to transact business within the state) are required to continuously maintain "a registered office in [the] State" and a "registered agent [for service of process] having a business office identical with such registered office,"[33] the New Jersey tolling statute is nondiscriminatory in that it "does not impose any burden on nonresident corporations that is not imposed equally on domestic corporations" which must "appoint an agent for service of process as a precondition to obtaining corporate status." Pet. at 7. See also, Pet. at 17 ("No out-

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31 See n.4 *supra*.

32 The court declined to review the provisions regarding nonresident individual defendants under the *per se* test on the theory that: "The purpose of this statute, however, is to preserve causes of action which New Jersey residents may have against nonresidents, not to erect barriers against foreign businesses competing with New Jersey ones." *Crespo v. Stapf*, 242 N.J. Super. 254, 258, 576 A.2d 346, 347-48 (N.J. Super. Ct. Law Div. 1990). This respondent respectfully maintains that the tolling provision in *Crespo* warranted review under the *per se* test.

33 N.J. Stat. Ann. § 14A:4-1(1) (West 1990). Pet. App. 56a-57a. See also, N.J. Stat. Ann. § 14A:4-2(1) (West 1990) (requiring said agent to accept service of process on behalf of corporation). Pet. App. 57a.

of-state-corporation is subjected to a registration burden that is not applied equally to New Jersey corporations"). This previously unasserted[34] argument fails to appreciate the basic difference between *intra*state and *inter*state commerce, and fails to understand the elementary proposition of constitutional law that the scope of permissible state regulation is considerably greater with respect to the former.[35] Moreover, petitioners' argument regarding the scope of permissible state regulations with respect to corporations with substantial intrastate activities is completely irrelevant to foreign corpo-

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34 Since this statutory argument was not raised below, petitioners cannot properly assert it in their petition to this Court. *See G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412, n.7. Petitioner did make arguments below based upon different New Jersey statutes affecting corporations, but they were significantly different. N.J. Stat. Ann § 14A:13-11 (West 1969) pertains to foreign corporations engaged in intrastate business activities, and provides, *inter alia*, that any such corporation which fails to obtain a certificate of authority to transact business in the state is prohibited from maintaining "any action or proceeding in any court of this State." § 14A:13-11(1). Petitioners, citing subparagraph (2) of the statute, argued that since foreign corporations transacting business in the state who fail to obtain a certificate of authority are not precluded from "defending any action or proceeding" the New Jersey tolling statute was not unduly burdensome:

> Furthermore, the denial of a limitations remedy does not even impair the ability to defend a suit on the merits or to raise the equitable defense of laches. The New Jersey statutory scheme explicitly states: [citation to N.J. S.A. § 14A:13-11(2).

Third Circuit "Brief for Plaintiffs-Appellees Stephen and Mary Juzwin" at 9. See *Materials Research Corp. v. Metron, Inc.*, 64 N.J. 74, 312 A.2d 147 (1973) ("transacting business term of § 14A:13-11 does not apply to corporations engaged only in interstate commerce).

In support of their argument petitioners also cited N.J.S.A. § 14:13-3(2) (West 1969) which provides, *inter alia*, that "a foreign corporation shall not be considered to be transacting business within this State" by virtue of its participation in a legal proceeding. § 14:13-3(2)(a). See above-referenced brief at 16 (also citing N.J.S.A. § 14A:13-11(2)).

35 *See, e.g., Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 284 (1961) (non-New Jersey corporation which engaged in "local intrastate business" through New Jersey office with 18 salaried employees could be barred from maintaining action in state court for noncompliance with state statutory scheme requiring such corporations to obtain certificate of authority. *See generally* L. Tribe, *American Constitutional Law* § 6-5 (2d ed. 1988).

rations engaged in purely interstate or (like respondent Carey Canada) international commerce.

Given the facially discriminatory character of the tolling provision at bar, the Third Circuit's use of the heightened scrutiny standard of commerce clause review is clearly proper and in accordance with this Court's decision in *Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1990).

B. The Tolling Provision at Bar Cannot Survive Scrutiny Under the Interstate Commerce Clause Balancing Test

Petitioners maintain that the Third Circuit also erred in finding the tolling statute violative of the commerce clause under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). See Pet. at 18-21. Petitioners do not contend that the statute at bar should have been reviewed under the deferential standard of commerce clause review;[36] rather they maintain that the Third Circuit improperly applied the balancing test in a manner "tantamount to very strict scrutiny." Pet. at 18.

Petitioners' argument that the balancing test was misapplied is based primarily upon their assertion that the Third Circuit's decision below "was in flagrant disregard of this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 410-11 (1982)."[37] The decision below does not conflict

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36 As the Third Circuit noted: "None of the parties argue that the correct standard to be applied to the New Jersey tolling statute is that of deferential review. New Jersey has, of course, a legitimate interest in facilitating the claims of its citizens, but we are not here concerned with a 'peculiarly strong' state interest, such as health or safety. These are the areas that most commonly invoke the deferential standard. *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 689, n.2 (3d Cir. 1990) (quoting *Ford Motor Co. v. Insurance Comm'r of Pa.*, 874 F.2d 926, 941 (3d Cir.), *cert. denied sub nom., United Services Auto. Ass'n v. Foster*, 110 S. Ct. 418 (1989)).

Petitioners' statements to the effect that the Third Circuit should have been "relatively deferential" or shown "substantial deference" to the New Jersey tolling statute appear only in connection with their request for review under the *Pike* balancing test. See, e.g., Pet. at 7 and 18.

37 Pet. at 19. See also Pet. at 6 ("[The Third Circuit's] holding was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455

with this Court's decision in *Cohn*. In *Cohn*, this Court affirmed the Third Circuit's ruling upholding New Jersey's previous—not current—tolling statute against an equal protection challenge, but nevertheless vacated the judgment below and remanded the case to the court of appeals for consideration of petitioner G.D. Searle's argument that the statute violated the Commerce Clause.[38]

As in the proceedings below, petitioners rely on decisions upholding the previous New Jersey tolling statute against due process[39] and equal protection challenges in support of their argument that the courts' "balancing" of the predecessor tolling statute's burdens and benefits under those constitutional tests impels the conclusion that the current tolling statute should be upheld if reviewed under the "balancing test" employed in commerce clause cases.[40] This argument ignores

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U.S. 404 (1982), a decision which rejected the *identical* overinclusivity attack on the New Jersey tolling statute asserted in the guise of an equal protection challenge.") (emphasis in original); Pet. at 7 ("flagrant disregard"); Pet. at 6 and 19 (Third Circuit "did not even attempt to distinguish" *Cohn*).

38 455 U.S. 404, 412 (1982), *remanded sub nom., Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir. 1982). The Third Circuit in turn remanded the case to the district court to develop a record regarding the commerce clause issues. 677 F.2d at 302, *on remand*, 598 F. Supp. 965 (D.N.J. 1984). The district court held the predecessor tolling statute violative of the commerce clause and determined that its decision should be retroactively applied. 598 F. Supp. at 969. The Third Circuit reversed the district court's decision only with respect to the retroactivity issue and remanded for further proceedings consistent with that ruling. *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 467 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

39 In the consolidated *Cohn v. G.D. Searle & Co./Hopkins v. Kelsey-Hayes* cases, Third Circuit rejected both due process and equal protection challenges to the previous New Jersey tolling statute. *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 811 (3d Cir. 1980). Since G.D. Searle & Co. tried to assert different due process arguments in the proceedings before this Court, only the equal protection challenge was reviewed. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 412, n.7 (1982)

40 See, e.g., Pet. at 6 (stating that the Third Circuit's decision below "was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), a decision that rejected the *identical* overinclusivity attack on the [predecessor] New Jersey tolling statute asserted in the guise of an equal protection challenge") (emphasis in original).

the reality that the "balancing tests" employed in due process and equal protection cases vindicate different interests[41] and are substantially more deferential to state regulations than the "balancing test" employed in commerce clause cases.[42] Indeed, to illustrate this principle one need only recall that although the predecessor New Jersey tolling statute was upheld by the Third Circuit and this Court against equal protection and due process challenges in *Cohn v. G.D. Searle*,

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41 For purposes of due process and equal protection analysis, so-called "economic and social regulations" (such as tolling statutes) are reviewed under the highly deferential "rational basis" test which virtually presumes an enactment valid unless the litigant challenging it shows it to be "demonstrably arbitrary or irrational." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (due process). Equal protection and due process review require only that the court ask whether the challenged enactment is rationally related to any constitutionally permissible state interest. *See Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 809 (3d Cir. 1980). Furthermore, there is authority that review under that standard permits the court to hypothesize as to the motivations of the state legislature to find a legitimate objective promoted by the legislation under attack. *See Weinberger v. Salfi*, 422 U.S. 749 (1975). Since the Commerce Clause vindicates the exclusively federal power over international and interstate commerce, a less deferential standard of review is appropriate than that employed in rational basis due process and equal protection cases reviewing economic and social regulations predicated upon the states' traditional police powers.

42 *See, e.g., Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893-94, text preceding n.3 (1988) ("It is true that serving foreign corporate defendants may be more arduous than serving domestic corporations or foreign corporations with a designated agent for service, and we have held for Equal Protection purposes that a State rationally may make adjustments for this difference by curtailing limitations protection for absent foreign corporations. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Nevertheless, State interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny"); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1285 (5th Cir. 1978) (Wisdom, J., opinion of the court) (striking an Idaho "takeover statute" under commerce clause balancing test characterized as providing "a stricter standard [of review] than the 'rational relationship' test of due process analysis"), *rev'd on other grounds*, 443 U.S. 182 (1979). *See also* G. Gunther, *Cases and Materials on Constitutional Law* at 311 (9th ed 1975) (cited in *Great Western*, 577 F.2d at 1285); *Juzwin*, 900 F.2d 686, 695. Pet. App. 23a.

that same statute was shortly thereafter stricken as violative of the Commerce Clause.[43]

Contrary to petitioners' assertions that the court below "failed to recognize New Jersey's legitimate interest in its tolling statute,"[44] the Third Circuit expressly acknowledged that interest, but found the burdens of the statute "grossly disproportionate to the state's interest in assisting resident plaintiffs in the pursuit of claims against foreign corporations." *Juzwin*, 900 F.2d 686, 691, 692. Pet. App. 14a.

C. The Existence of a Commerce Clause Violation is Not Dependent Upon a Finding that a State's Enactment Confers Competitive Advantages Upon its Residents

Petitioners seem to argue that the tolling statute does not impermissibly burden interstate commerce since it does not create any competitive advantages for New Jersey businesses. See Pet. at 7, 10, 15-16. While not conceding the factual premise of that argument, this respondent maintains that petitioners' legal theory is far too simplistic a view of the commerce clause and one not adequately supported even by the cases they cite.[45]

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43 See note 38 and accompanying text *supra*.

44 Pet. at 18. See also Pet. at 6 (The [Third Circuit] held that New Jersey lacked a legitimate interest in ameliorating the impact of the statute of limitations. . . .")

45 For example, petitioners' theory fails to account for the heightened scrutiny standard of review applicable to facially discriminatory enactments. See Point IIA *supra*. Furthermore, this respondent does not find support in the cases cited for the broad proposition that creation of competitive advantages for domestic corporations is the definitive test of a commerce clause violation.

III.

EVEN IF THE THIRD CIRCUIT USED AN INAPPROPRIATE STANDARD OF INTERSTATE COMMERCE CLAUSE REVIEW, THE DECISION BELOW STRIKING THE NEW JERSEY TOLLING STATUTE IS WARRANTED UNDER THE STANDARD OF SCRUTINY APPLICABLE TO REGULATIONS BURDENING INTERNATIONAL COMMERCE

Even if this Court determines that the Third Circuit erred in striking the New Jersey tolling statute under the heightened scrutiny or balancing tests applicable to regulations burdening interstate commerce, issuance of the writ would nevertheless be inappropriate since the enactment could not survive review under the most stringent standard of review applicable to enactments burdening "foreign"—*i.e.* international—commerce. Although defendant Carey Canada argued below that the tolling statute could be stricken under the foreign commerce clause, the Third Circuit found it unnecessary to reach that issue in light of its holding that the enactment impermissibly burdened interstate commerce. See *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 690, n.6. Pet. App. 12a.

Article I, § 8 of the United States Constitution grants Congress the power "to regulate Commerce with foreign Nations." "This clause has been construed as all but exclusive: 'It is an essential attribute of the power that it is . . . plenary . . . [and that] its exercise may not be limited, qualified or impeded to any extent by state action.' " L. Tribe, *American Constitutional Law*, § 6-21 at 468 (2d ed. 1988) (quoting *Board of Trustees of the Univ. of Illinois v. United States*, 289 U.S. 48, 56 (1933)). [Hereinafter cited as "Tribe"]. *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (regulation of foreign commerce is exclusively a federal power); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 125, 131 (3d ed. 1986).

Since the powers of the federal government concerning foreign or external affairs are different in origin and nature from those involving domestic or internal affairs,[46] it is

46 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Power over domestic affairs is shared by the federal government and the

hardly surprising that state enactments burdening international commerce are subject to stricter scrutiny than those which burden only interstate commerce. "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." *South Central Timber Development Inc. v. Wunnicke*, 476 U.S. 82, 100 (1984). In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), a decision striking a California *ad valorem* property tax statute as applied to Japanese shippers, the Court expressly rejected arguments that regulations burdening international commerce are entitled to no more stringent review under the Commerce Clause than that applied to regulations affecting interstate commerce. *Id.* at 446, 448 and nn. 12 and 13.

As mentioned above, Carey Canada is incorporated under Canadian law, has no corporate offices in the state of New Jersey, has never been registered to do business in the state of New Jersey, and has not appointed an agent for service of process with the New Jersey Secretary of State. Since Carey Canada sold its asbestos fiber "F.O.B. Quebec, Canada"[47] it did not conduct its business operations in the United States and is entitled to have the New Jersey tolling statute reviewed under the exacting standard applicable to state regulations burdening foreign commerce. Given the broad definition of "foreign commerce,"[48] and the obvious impact on such com-

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states since the former's powers were carved from the general legislative powers originally held by the states. In the domestic sphere the federal government possesses only those powers specifically granted to it by the Constitution and those "necessary and proper" to the exercise of those enumerated powers. Power over foreign affairs, however, was never possessed by the states since it passed directly from the sovereign nation of Great Britain to the federal government. *Id.* at 316-18.

47 See n.11 and accompanying test *supra*.

48 Tribe at 468-469. In the proceedings below, Carey Canada called the Third Circuit's attention to a case in which that court declined to employ the broadest permissible interpretation of the term "burden on commerce" for purposes of foreign commerce clause review. As Carey Canada explained below, however, that decision is distinguishable from the case at bar since it involved a nondiscriminatory regulation which presented only a hypothetical

merce in the case at bar, review under the foreign commerce clause would surely strike the tolling statute in the case at bar. Indeed, in *Bendix* this Court struck a similar Ohio tolling statute under a less rigorous interstate commerce clause standard due to the "significant" burdens that enactment imposed. 108 S. Ct. 2218, 2221 (1988). Furthermore, the greater cumulative burden the tolling statute poses to international commerce also argues for invalidation of the statute under the foreign commerce clause.[49]

IV.

RETROACTIVE APPLICATION OF THE THIRD CIRCUIT'S DECISION STRIKING THE NEW JERSEY TOLLING STATUTE ON COMMERCE CLAUSE GROUNDS CONSTITUTES A PROPER APPLICATION OF THIS COURT'S PRECEDENTS

Petitioners maintain that the Third Circuit's ruling according its decision striking the tolling statute retroactive effect represents "an inappropriate application of the standards laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Lemon v. Kurtzman*, 411 U.S. 192 (1973)." Pet. at 22. Petitioners do not assert that the Third Circuit employed a principle of retroactivity which conflicts with a decision of this Court, or a decision of another court of appeals, nor do they ask this Court to enunciate a new rule of law. See Pet. at 22-25.

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burden to foreign commerce: its only potential effect on that commerce was an increase in price to ultimate consumers of the litigant's product. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 404-407 (3d Cir. 1987). In addition to distinguishing that case, Carey Canada also argued that a broad interpretation of the term "burden on commerce" for purposes of international and interstate commerce clause review is supported by the decisions of this Court. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer growing wheat for home consumption subject to regulation under federal power over interstate commerce).

49 The cumulative nature of burdens imposed by the tolling statute was discussed in Carey Canada's opening brief to the Third Circuit at 22.

Respondent Carey Canada respectfully maintains that petitioners' mere claim of misapplication of the correct retroactivity standards does not constitute a sufficiently "special" or "important" matter to warrant issuance of the writ. Rule 10. Indeed, review of the retroactivity issue in accordance with petitioners' request would amount to no more than a repetition of the Third Circuit's meticulous application of the proper balancing test to a case involving a state statute with a long, intricate history.

In making its retroactivity ruling, the Third Circuit, drawing on *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), applied the three-factor test enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

> First the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

Although *Chevron* calls for consideration of arguments pertaining to each of the three factors, the ultimate decision regarding retroactivity must be based on an overall evaluation of the merits. A litigant seeking to avoid retroactive application bears the burden of establishing that "on balance the weight of the three *Chevron* factors favors prospective application." *Juzwin*, 900 F.2d at 693. Pet. App. 17a-18a. In the case at bar the Third Circuit ordered retroactive application based upon a finding that all three *Chevron* factors favored

retroactive application. *Juzwin*, 900 F.2d at 693-97. Pet. App. 15a to 26a.

Petitioners apparently maintain that the Third Circuit erred in applying the first *Chevron* factor[50] in finding that petitioners "could not have reasonably relied upon the statute in failing to bring suit earlier." Pet. at 23.

Petitioners suggest that their reliance on the tolling statute was reasonable since the previous version of the enactment had been subject only "to several constitutional challenges from 1983 to 1986." Contrary to petitioners' suggestion, the predecessor tolling statute had been challenged on various constitutional grounds since 1963,[51] and was under almost continuous attack from 1978 to 1986 in both federal and state courts.[52] Moreover, the predecessor statute had been

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50 Petitioners do not expressly state which *Chevron* factors they are addressing. See Pet. at 23-25.

51 See *Lemke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963) (upholding statute against equal protection challenge).

52 A chronological account of the *Coons* and *Cohn* litigations highlights petitioners' imprudence in delaying the filing of their action.

In 1978, the district court held that by denying the statute of limitations defense to nonresident corporations subject to long-arm jurisdiction, the predecessor tolling statute violated the Equal Protection Clause of the Fourteenth Amendment. *Cohn*, 447 F. Supp. 903, 912 (D.N.J. 1978). In 1980, the Third Circuit reversed. *Sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980). (Although Searle raised the commerce clause issue in its brief as a subsidiary argument, the Third Circuit declined to address it. See *Hopkins*, 677 F.2d 301, 302 (3d Cir. 1982)).

In 1980 American Honda unsuccessfully argued in both the law and appellate divisions of New Jersey Superior Court that the predecessor tolling statute unduly burdened interstate commerce. See *Coons v. American Honda Motor Co.*, 176 N.J. Super, 575, 424 A.2d 446 (App. Div. 1980). American Honda then sought leave to appeal the issue to the New Jersey Supreme Court. See *Coons I*, 94 N.J. 307, 463 A.2d 921 (1983). When that court refused to hear the case, American Honda appealed it to this Court. *Id.*

In February of 1982, this Court affirmed the Third Circuit's 1980 equal protection ruling in *Hopkins*, 628 F.2d 801, but remanded the case to the court of appeals for consideration of Searle's commerce clause argument. *Cohn*, 455 U.S. 404, 414 (1982).

(footnote continued)

under attack on commerce clause grounds beginning in 1980.[53] As the opinion below so carefully explains, petitioners' delay in filing suit in reliance on the tolling statute cannot be justified. See *Juzwin*, 900 F.2d at 692-95. Pet. App. 18a-23a.

Petitioners also maintain that since the New Jersey legislature drafted the current tolling statute in 1984 specifically to

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In March of 1982, this Court vacated the state court judgment in *Coons*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980) (rejecting American Honda's commerce clause challenge to the tolling statute), and remanded the case for reconsideration in light of the recent decision in *Cohn*, 455 U.S. 404. *Honda Motor Co. v. Coons*, 455 U.S. 996 (1982). In response to this remand, the New Jersey Supreme Court certified the cause on its own motion. See *Coons*, 94 N.J. 307, 463 A.2d 921 (1983).

In April of 1982, the Third Circuit remanded *Cohn* (*sub nom. Hopkins v. Kelsey Hayes, Inc.*, 677 F.2d 301 (3d Cir 1982)) to district court to develop a record regarding commerce clause issues.

In August of 1982, plaintiff Stephen Juzwin learned of his alleged injury when he was diagnosed as having an asbestos-related condition. In August 1983 the New Jersey Supreme Court held the predecessor tolling statute unduly burdensome of interstate commerce and applied that ruling retroactively. *Coons I*, 94 N.J. 307, 463 A.2d 921 (1983). In January of 1984 the New Jersey Supreme Court heard argument as to whether it should reconsider its retroactivity ruling and in June of that year it issued a decision providing for prospective application. *Coons II*, 96 N.J. 419, 476 A.2d 763 (1984).

In response to *Coons I*, the New Jersey legislature hastily drafted, debated and enacted into law—in August of 1984—a successor [the current] tolling statute.

In December 1984, the district court held that the predecessor tolling statute violated the commerce clause and retroactively applied its decision. *Cohn*, 598 F. Supp 965 (D.N.J. 1984). Like many, if not all significant developments regarding the tolling statute, the ruling was reported at length in the legal trade press. See 115 N.J.L.J. 135 (1985). In 1986, the Third Circuit reversed the district court's decision only with respect to the retroactivity ruling. *Cohn*, 784 F.2d 460, 467.

53 The opinion below states that the "first hint of a commerce clause problem with the New Jersey tolling statute came early in 1982 with the Supreme Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982)." *Juzwin*, 900 F.2d at 693. This respondent notes that the previous tolling statute was challenged in state courts on commerce clause grounds as early as 1980. See preceding footnote *supra*.

cure the constitutional defects of the predecessor tolling statute stricken by *Coons I*[54] and *Cohn v. G.D. Searle & Co.*,[55] plaintiff Juzwin's reliance on the current enactment was reasonable. This argument is also unpersuasive.

As previously stated, following the New Jersey Supreme Court's decision in *Coons I* striking the tolling statute, the New Jersey legislature rushed to enact a replacement. The replacement (*i.e.*, the current tolling statute), enacted in effect under emergency conditions, was identical to the old statute except for the final "designation of agent" provision added to avoid the "forced licensure" defect identified in *Coons I*. See Preliminary Statement *supra*. Since lawyers practicing in common law jurisdictions inevitably reassert legal theories which have prevailed in past cases, a commerce clause challenge to the replacement tolling statute was to be expected. The fact that the legislature merely repaired the one defect identified in *Coons I* without considering whether the revised statute could withstand commerce clause scrutiny made that challenge all but inevitable. The fact that the *Coons I* court struck the "forced licensure" aspect of the predecessor tolling statute does not give grounds for reliance on a replacement statute hastily repaired by addition of an untested "designation of agent" provision. In drafting the current tolling statute, the 1984 New Jersey legislature simply did not correct the long-standing "amenability to service" problem which required the holding below. *Juzwin*, 900 F.2d at 695. Pet. App. 23a.

In support of their argument regarding the second *Chevron* factor, petitioners suggest that Judge Seitz did not give due consideration to the Third Circuit's 1986 ruling requiring prospective application of the district court decision striking the tolling statute on commerce clause grounds. See Pet. at 24-25. While it is true that Judge Seitz did not quote from his opinion in *Cohn v. G.D. Searle & Co. v. Cohn*, 784 F.2d 460 (3d Cir. 1986) (Seitz, J., opinion of the court) in discussing

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54 96 N.J. 307, 463 A.2d 921 (1983).

55 598 F. Supp. 965 (D.N.J. 1984), *reversed in part and remanded*, 784 F.2d 460 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

the second *Chevron* factor, Carey Canada maintains that Judge Seitz' opinion below more than adequately explains why the marked differences between *Cohn* and the case at bar required retrospective application of the latter decision.[56]

Regarding the third *Chevron* factor, petitioners claim that equitable considerations favor prospective application of the decision below. Pet. at 25. This assertion ignores the reality that prospective application of the decision striking the tolling statute would cause great hardship to domestic, *i.e.*, New Jersey, corporations as well as foreign corporations which complied with the tolling statute. As the opinion below briefly mentions, under New Jersey law[57] the right of a defendant to seek contribution is not affected by the running of the limitations period. *Juzwin*, 900 F.2d at 696. Pet. App. 25a. "Thus, even New Jersey corporations and foreign corporations who have complied with the provisions of the tolling statute would continue to be deprived of the protection of the statute of limitations when they were joint tortfeasors with a nonrepresented foreign corporation"[58] which will implead them as third party defendants. *Id.*

Also unpersuasive are petitioners' arguments that equity favors plaintiffs who delayed filing their actions in reliance on the tolling statute,[59] and that the Third Circuit improperly

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56 See *Juzwin*, 900 F.2d 686, 692-697 (3d Cir. 1990) (Seitz, J., opinion of the court) (retroactivity discussion). Pet. App. 15a-26a. Since application of the *Chevron* retroactivity test requires a case-specific analysis, it would have been improper for the Third Circuit to uncritically repeat its 1986 ruling in *Cohn*.

57 N.J. Stat. Ann. § 2A:53A-1, *et seq.* (West 1987); *McGlone v. Corbi*, 59 N.J. 86, 279 A.2d 812 (1971) (defendant has right to implead unjoined, joint tortfeasor for purposes of proving their common liability even after limitations period on plaintiffs claim has run).

58 This is often the situation in asbestos and other toxic tort actions in which plaintiffs join a large number of defendants.

59 Equity certainly does not favor a plaintiff like Juzwin who, after recovering Workers Compensation settlements, delays for years before filing his action. See n.10 and accompanying text *supra*. The doctrine of laches "is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." H. Black, *Black's Law Dictionary* at 787 (5th ed. 1979).

ordered retrospective application without the benefits of factual determinations by the district court.[60]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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September 10, 1990

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60 See Pet. at 5. Petitioners should have submitted all their proofs when the retroactivity issue was litigated in district court. See Jt. App. at 16 (regarding Carey Canada's argument to the district court in favor of retroactive application).

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-45449-87

ARMENTI, *et al.*,

Plaintiffs,

—vs.—

CAREY CANADA, *et al.*,

Defendants.

MOTIONS

Middlesex County Courthouse
New Brunswick, New Jersey
May 27, 1988

Before: Honorable John E. Keefe, J.S.C.

APPEARANCES: Wilentz, Goldman & Spitzer
By: Philip A. Tortoreti, Esq.,
Attorneys for the Plaintiffs

McCarter & English
By: Gita F. Rothschild, Esq.,
Attorneys for Carey Canada & Turner & Newell

Goldfein & Joseph
By: Roseann Lynn Brenner, Esq.,
Attorneys for ACL & Bell

Harry Z. Haushalter, Esq.,
Deputy Attorney General
Attorney for the Intervenor

Stanley Grabon, C.S.R.
Official Court Reporter

[2] (May 27, 1988.)

THE COURT: Armenti versus Carey Canada.

MR. ROTHSCHILD: Gita Rothschild; McCarter & English, for Carey Canada and Turner & Newall.

MS. BRENNER: Roseann Brenner for A. C. L. and Bell.

MR. HAUSHALTER: Harry Haushalter for the intervenor, Attorney General of New Jersey.

MR. TORTORETI: Philip Tortoreti for Wilentz, Goldman & Spitzer, for the plaintiff.

THE COURT: I assume no one has any opposition to the Attorney General's motion to intervene on this motion; is that correct?

MS. ROTHSCHILD: That's correct.

THE COURT: Okay. That motion is granted.

MR. HAUSHALTER: Thank you, your Honor.

THE COURT: Mr. Tortoreti, this is your motion.

MR. TORTORETI: Good morning, your Honor. As you know, this is a motion addressing the—affecting the constitutionality of the statute, the new tolling statute. I think that we can say that it is not in dispute that the defendants here do not have an agent designated for service of [3] process. We can say that it is not disputed that if the tolling statute is constitutional, that the statute of limitations has not run. They do not dispute that the new tolling statute was made effective law in 1984 and, therefore, there was no break between the Coons-II decision and the tolling statute, the new tolling statute.

What we have is a constitutional challenge.

THE COURT: Well, the relief that you seek specifically is to strike the defense of statute of limitations.

MR. TORTORETI: That's correct. The statute of limitations has not even commenced running as of this date as against these defendants because they do not have agents appointed for service of process.

As regards the due process and equal protection challenges, I don't know that there's anything that I have to say. I mean that has been addressed thoroughly in prior decisions. I have nothing to add that.

As to the, as to the challenge which was effective in overturning the prior tolling statute, we start out that there has to be a presumption in favor of constitutionality by the [4] court. The case law is clear, that your Honor must presume constitutionality, and further that your Honor, if you are leaning toward an interpretation that might find the statute unconstitutional, you must interpret it in a constitutional manner, if you can reasonably.

Given that background, given the fact that there's also a presumption that the legislature acted with knowledge of the constitution and in consideration of the constitution, and given the fact that this legislative act, the amendment to the tolling statute specifically states that the legislature was addressing the constitutionality of the statute, I think it's clear that even if we say no more and don't even address the merits, that this statute is constitutional at least as regards this court's review of it.

Going to the merits of the argument, Coons-1 found the prior tolling statute unconstitutional because it was silent on designation of an agent for service of process by a foreign corporation. That being the case, it looked to the other avenues by which a foreign corporation could designate an agent, and the majority, the four member majority as compared to [5] the three member dissent found the only way that could be done is by actually registering to do business.

They then characterized that as a forced licensure and it was therefore a violation of the commerce clause. We do not have that now. What we have now is a designation, a simple designation for service of process. There is absolutely no other baggage that goes along with it. Simply designated for service of process. They can do this by a simple filing with the Secretary of State's office.

They have argued that subjects them to the jurisdiction of this court and the courts of New Jersey and, therefore, they are giving up jurisdictional defenses. Those jurisdictional defenses have been unsuccessful as to these defendants in the past. But even disregarding that, they offer absolutely no indication whatsoever of one instance where designating an agent for service of process pursuant to the new tolling stat-

ute has resulted in a waiver of any jurisdictional defenses, in personam jurisdictional defenses.

I would submit, your Honor, first of all, [6] that even if they did, if it was a waiver, that does not render the statute unconstitutional and that does not constitute a forced licensure and you would be forced into a balancing test under the applicable law, not a per se violation.

THE COURT: Let me stop you for a second. You're saying that there's nothing in the statute that implicates or suggests that someone who files and designates an agent for the service of process is consenting to the jurisdiction of the court in personam.

MR. TORTORETI: That's correct.

THE COURT: All right.

MR. TORTORETI: Absolutely true.

THE COURT: So that they can come in and defend.

MR. TORTORETI: Absolutely.

THE COURT: On due process.

MR. TORTORETI: That's correct.

THE COURT: All right.

MR. TORTORETI: They can say that this court or any court in the State of New Jersey has no in personam jurisdiction.

Even if they did lose the in personam jurisdiction defense as a result, I would submit [7] that the balancing test procedure as compared to the per se violation procedure would be in place. But I think, by the way, your Honor has to look at the statute as constitutional.

What the tolling statute does by allowing appointment of an agent for service of process is places the foreign corporation as regards service of process in exactly the same position as the domestic corporation with respect to service of process, that is, that a New Jersey plaintiff can serve process on a putative or a potential defendant by serving somebody in New Jersey.

Now these defendants argue that we have been able to serve them in Canada, so that that's ridiculous. First of all, these are not the only foreign corporations that exist in the world. There are lots of them. Number two, if we—it so happens that we are able to serve them with process, these defen-

dants, because they have been involved in asbestos litigation in New Jersey for ten, twelve, fifteen years.

The court has to view this in the context of the general law, the general situation. This is a constitutional challenge. That's pointed out in my papers, that at least Asbestos Corporation [8] Limited at one point in time acknowledged that the new tolling statute is constitutional and they were trying to undermine the retroactive effect of the statute.

THE COURT: Mr. Tortoreti, now that you have got me into the balancing test, let's get to the critical issue. Tell me what the difference between our statute and the Ohio statute is. Distinguish, in other words, the Bendix case from—

MR. TORTORETI: The Ohio statute, your Honor, did not carry with it an appointment for service of process clause. The Ohio statute was the same as our old tolling statute. If you read the opinion, the opinion is completly clear.

THE COURT: I've read it.

MR. TORTORETI: All right. I'm not implying that you didn't, your Honor. You might have drawn that inference.

THE COURT: Yes, I might have.

MR. TORTORETI: We are suggesting that maybe counsel for A. C. L. and Bell didn't read the opinion.

MS. BRENNER: I object to that.

MS. ROTHSCHILD: Thanks, Phil.

[9] MR. TORTORETI: You did get me off track. I'm sorry. When the court in the federal court in Ohio indicated that they were dealing with conjecture and speculation, it was because there was conjecture and speculation as to whether or not there could be a simple designation. We do not have that here. We have an absolute designation provision.

I have the opinion—I do not have the opinion here, your Honor, but I quoted it in my brief.

THE COURT: What are you looking for?

MR. TORTORETI: At page 189 of the opinion they characterize it, the argument made by the party trying to toll the statute, as highly speculative and void of any statutory support. The statutory support that they are referring to, if you read that clause in pari materia with the rest of the decision, is that there is no provision in that statute for appointment

of service of process, of an agent for service of process. We have that here.

I think that it's a distinguishable statute. It's really more akin to the tolling statute that was found unconstitutional.

[10] THE COURT: Okay. Thank you. Mr. Haushalter?

MR. HAUSHALTER: Thank you, your Honor. Let me concur with Mr. Tortoreti's argument, and he is correct with regard to the Bendix decision. I think that page 189 the court said with regard to Bendix's suggestion that the corporation may merely notify the Secretary of State of it's designated representative, we note simply here that this argument is highly speculative and devoid of any statutory support. That's the Coons-1. And the Ohio court simply indicated there was no statutory support for a foreign corporation to merely designate an agent. It must actually register to do business. The forced licensure.

We have here an argument of forced representation. That seems to be the argument that in order for a foreign corporation to avoid the tolling it must designate an agent, and by doing so it exposes itself to suit from any plaintiff, from anywhere. We disagree. That is not, in fact, the case.

We pointed out first of all that the designation that can be filed with the Secretary [11] of State clearly can be limited so that the in personam defense is not destroyed, that the foreign corporation can still defend on the basis of no in personam jurisdiction.

THE COURT: Of course that's not provided for in the statute, though, is it?

MS. HAUSHALTER: This is part of the jurisdictional right of the Secretary of State to accept these types of designations and he, in fact, is doing that or she is doing that. That in fact is the way that many of these foreign corporations are designating agents.

THE COURT: That's exactly what the Sixth Circuit found wrong with the Ohio statute in that it did not provide for that exception.

MR. HAUSHALTER: Well, we feel our statute does provide for it.

THE COURT: Why would you have to? I guess the point that I am getting to is why does the Secretary of State really have to do that? Why would the Secretary of State have to affirm in some way that a person who files and names an agent in this state would have the right to contest in personam jurisdiction? It's a constitutional right anyway.

[12] MR. HAUSHALTER: The Secretary of State is just accepting filings. I don't think that it's up to the Secretary of State to gauge whether the filings are proper or not. She is accepting these filings. Whether those filings are valid, whether in fact the limited designation has validity, would have to be argued in individual cases. We maintain that it's a proper method for dealing with this situation.

THE COURT: I think that you think that I am fighting with you, but actually I think that I am agreeing with you. Justice Stevens in his dissent in the Coons case points out the fact that one can—no state legislation can ever void a party's right to come into a jurisdiction and contest on the due process clause jurisdiction over the person. I think that I am agreeing with you.

MR. HAUSHALTER: We subscribe to your Honor's position. I think that Mr. Tortoreti appropriately noted that we had three justices in Coons-1, and they dissented, but they dissented with regard to the very issue that was decided in that Bendix case, namely that you do have, or they felt that the Secretary of State could accept the [13] designations without having these foreign corporations actually file to do business. The point being once having reached that result, those three justices said that that kind of a designation is constitutional under a balancing test.

And the critical quote is on page 328 of 94 N.J., where the court is saying, "the message they send to the"—this is the foreign corporations—"message they send to the New Jersey consumer is clear and forceful. The legislature has asked manufacturers to send one little brief message about where they can be found if anything goes wrong with the motorcycle. Again, this is Honda, the defendant here."

If this kind of an argument, the forced representation is sustained, then we have no tolling statute. There is just no

tolling statute. This destroys the very heart of the tolling statute, which means that a foreign corporation which cannot be reached can wait two years, or whatever the appropriate statute of limitations is, and then come into the state and not be concerned about ever being sued. Forget about the long arm, of course.

[14] This is really the critical aspect of this case, judge, because if this kind of an argument is sustained, there's no tolling statute, and the New Jersey plaintiffs are not going to be protected and this is the critical issue that was decided in Coons-II decision, and in the Searle case where we had very clear statements by the U.S. Supreme Court about the importance of this policy of sustaining causes of action for New Jersey plaintiffs.

And if you don't have a tolling statute you can't protect those plaintiffs, and I think that's ultimately what has to be decided in this case and that is what the balancing test is all about.

Thank you, judge.

THE COURT: Isn't that basically the issue here? If I knock out this statute, there's no tolling statute that can ever be passed and not violate the interstate commerce clause. How less minimal can the intrusion be than the New Jersey legislature has made it in this amended statute?

MS. BRENNER: Well, your Honor, I have a different interpretation of the Bendix case than counsel.

THE COURT: That's not my question. That's [15] not my question. My question is what I've just asked you. How less intrusive could a statute be, a tolling statute be than the New Jersey statute already is?

MS. BRENNER: The statute that would contain a provision that would protect a foreign corporation's right to object to in personam jurisdiction.

THE COURT: I just made that point before. Do you disagree with the point that you have that right regardless of what a statute says or doesn't say? How can a statute ever preserve for you a right that you have? It's part of the organic law.

MS. BRENNER: It's our position, your Honor, that it's quite possible that by designating an agent we could possibly be waiving that right.

THE COURT: Under what theory?

MS. BRENNER: Under the theory that then there is a resident agent of the state who is accessible to be served with suit by any New Jersey claimant on any cause of action filed in any state or federal court in New Jersey, and it's a position of A. C. L. and Bell that they always [16] object to in personam jurisdiction.

THE COURT: Let me give you a hypothetical, okay? Let's assume that Bell Asbestos Mines delivered its fiber into the United States but not to the State of New Jersey. Your driver went from Canada, around the State of New Jersey, to Delaware, left off his fiber, and instead of going back the same route to Canada, came up the New Jersey Turnpike, and someone—and Mr. Tortoreti happened to see him going up the Turnpike and hit him with process. There's no question that he was served, right?

MS. BRENNER: Yes, your Honor.

THE COURT: Are you telling me that you can't come in to court and raise the question of jurisdiction over the person of Bell Asbestos based upon that service?

MS. BRENNER: No, your Honor.

THE COURT: All right. Service is a separate issue from jurisdiction, isn't it?

MS. BRENNER: Yes, your Honor.

THE COURT: Okay.

MS. BRENNER: Your Honor, if I may address the Bendix case, I think what's important that everybody is overlooking is the fact that the [17] Sixth Circuit found that the impermissible burden, irrespective of what is required of the defendant, was the fact that they had to, which your Honor just nullified my argument about waiving jurisdiction, whether they have to choose to be exposed to suit ad infinitim or subject themselves possibly to service of process of claims that may not otherwise meet minimal contacts.

THE COURT: I'm not making any holding now. I'm asking you questions and I think that's an interesting question that

we have to address, and I guess what I'm suggesting is the Sixth Circuit didn't have to say that much. That's all that I am saying. I'm not bound by the Sixth Circuit.

MS. BRENNER: That's correct.

THE COURT: But in terms of analyzing the law, I'm just wondering whether they had to say that much. Is the Ohio statute different from our prior statute, or is it basically identical?

MS. BRENNER: It's similar statute, your Honor.

THE COURT: Okay. Getting back to my original question then. If you are in a jurisdiction that's governed by the Sixth Circuit opinion and you are a legislator, what kind of a [18] tolling statute can you pass that would meet the constitutional muster of Bendix? The answer is none, right?

MS. BRENNER: Well, one that provides for preserving that right, your Honor.

THE COURT: All right.

MS. BRENNER: Which your Honor has stated to me you believe that is an organic right under the due process clause.

THE COURT: Well, do you disagree with me?

MS. BRENNER: I would debate it, your Honor.

THE COURT: Well, you're a good advocate. I would expect you to debate it, but now I want you to tell me why you disagree with me legally. What's wrong with that analysis?

MS. BRENNER: I'm at a loss, your Honor.

THE COURT: Okay. You have raised the defense of laches.

MS. BRENNER: Yes, I have, your Honor.

THE COURT: In the event that I should find that the statute is constitutional, you say that, nonetheless, the plaintiff's claim is barred by the doctrine of laches.

MS. BRENNER: That's correct, your Honor. [19] I believe that if you take the intent of the tolling statute, which has been stated by counsel and your Honor to protect claims of New Jersey plaintiffs, and you look to the doctrine of laches which states that a plaintiff who has inexcusably delayed bringing a claim, the only excusable delay for a plaintiff to bring a claim under—I believe Searle and Velmohos implicitly state if a plaintiff was unable to serve a foreign, unrepresented foreign corporation due to the fact that they do not

have a designated agent or haven't registered to do business in the State of New Jersey, Velmohos stated flatly in clear language in the footnote that if an unrepresented foreign corporation does not have the defense of the statute of limitations and the plaintiff has waited until it expired to bring suit, that defendant is permitted to raise the defense of laches.

Searle—and the United States Supreme Court quoted that language and stated flatly a defendant has that right to raise that defense. Implicit in that statement along with the statement of the court as to the interests sought to be protected by the tolling statute, the interests to be **[20]** protected is a plaintiff who can't find the defendant who has run out of time because of that difficulty.

Well, if a plaintiff waits eight, nine, ten years and a defendant is as easily served as A. C. L. and Bell within twenty-two days after they file suit, we don't see—I can't find the inexcusable, I mean the excusable delay. It's our position that it's inexcusable. Plaintiff has averred nothing to explain why he waited eight years to bring this suit after he was diagnosed in 1980. The suit was filed in '87.

THE COURT: Let me ask you a question. What is laches?

MS. BRENNER: That's an equitable doctrine, your Honor.

THE COURT: It's a defense, right?

MS. BRENNER: That's correct.

THE COURT: Who has the burden of proof on the defense?

MS. BRENNER: I do, your Honor.

THE COURT: Okay. And it's clear, isn't it, that laches is something that—as applied where the claim is not barred by the statute of limitations, correct?

[21] MS. BRENNER: Excuse me. I'm sorry.

THE COURT: Laches is a defense that can be used only where the claim is not barred by the statute of limitations. You don't need it otherwise.

MS. BRENNER: Right.

THE COURT: Okay: So the question of delay in filing suit has to be linked up with another element which you forgot to discuss, right? There's two elements to it.

MS. BRENNER: Prejudice, your Honor.

THE COURT: Right.

MS. BRENNER: It's obvious that a defendant sued eight years later in that witnesses, evidences, each year passes, it's either lost, misplaced, destroyed.

THE COURT: That's the problem with asbestos litigation in general, isn't it?

MS. BRENNER: That's correct, your Honor, and that's why you can't let stale claims be coming into court for no other reason than the plaintiff just didn't want to be coming into court until eight years later, and they are well aware of the situation, and this is well publicized litigation. A. C. L. and Bell have been involved **[22]** in this for years.

THE COURT: Tell me specifically how your client is prejudiced in this case.

MS. BRENNER: The man worked and was diagnosed in 1980. I have no information, I don't have any information in the papers as to his, how long he was employed and where he was employed.

THE COURT: You know where he was employed. You know from the complaint where he was employed, don't you?

MS. BRENNER: I'm not sure, your Honor.

THE COURT: I know from reading the briefs where he was employed.

MR. TORTORETI: Only because of your Honor's order which requires that we plead it.

THE COURT: All right. I also know that your client has been involved in litigation out of this plant for at least the last nine years that I have been sitting on asbestos litigation. Now I want to know how specifically in this case your client was prejudiced by the fact that he didn't file suit earlier. What witnesses have been lost because of his delay? Not because of the latency of the disease, which is a problem in and of itself, but because of his delay. What witnesses **[23]** have been lost?

MS. BRENNER: As a practical matter, your Honor, there's another area that has to be looked at. The only people that are, because of the tolling statute, the only defendants, viable defendants in this case, if the tolling statute is declared constitutional, is the unrepresented foreign corporation.

THE COURT: Not true.

MS. BRENNER: Unless the unrepresented foreign corporation now turns around and brings in the domestic or resident defendants.

THE COURT: What's wrong with that?

MS. BRENNER: That's a whiplash effect. The represented defendants in the state, they lose the benefit of the statute of limitations as well.

THE COURT: That's the way it goes. The statute of limitations on a claim for contribution doesn't arise until the judgment is entered against you.

MS. BRENNER: That's correct, your Honor.

THE COURT: That's to protect you, right? That protects you.

MS. BRENNER: Minimally, your Honor. If it never comes to judgment, if you never get a [24] judgment, then obviously you are not going to be hit for contribution or indemnity.

THE COURT: Exactly.

MS. BRENNER: Defendants originally have the benefit of that statute of limitations. The statute effectively eliminates the statute of limitations in asbestos or any litigation, actually, for resident as well as non resident defendants.

THE COURT: I'm still looking for prejudice. Show me prejudice and maybe they don't get the benefit of the statute. I'm still looking for it. Tell me where it is.

MS. BRENNER: Well, your Honor, I still think it's because the only viable defendants now are the unrepresented foreign corporations. Whether or not there's indemnification or contribution, they are still going through the cost of litigation; that's prejudice. Cost of litigation is awfully high. A lot of these cases obviously never come to trial. A lot do, but a lot don't come to trial.

I think that there's extreme prejudice in situations such as this where the statutes run on the resident defendants, I'll call

them, as [25] opposed to the unrepresented foreign corporations.

THE COURT: Okay. Thank you. Ms. Rothschild?

MS. ROTHSCHILD: Your Honor, you directed a question which asked if this tolling statute is declared unconstitutional, what less intrusive statute could be drawn? And I think that there is an answer to that, your Honor, because I think that I disagree with Mr. Tortoreti that this statute must be viewed only in the context of all of those foreign corporations who are not defendants in this case. I think quite the contrary. The statute ought to be viewed in this case in the context of these defendants, in the context of defendants who have been accepting service, appearing in this court, and defending cases, paying settlements and judgments for the last eight years.

And I think a statute could be drawn which excepts from its provisions defendants like these, defendants who do accept service and who do come in and defend and who behave in New Jersey just like domestic corporations in the context of responding to lawsuits.

THE COURT: But the Supreme Court of the [26] United States in the Searle case said that is not a legitimate argument when you're talking about the constitutionality of a statute, at least from the point of view of equal protection.

MS. ROTHSCHILD: I don't think that Searle made a distinction between defendants who have an agent for service of process and defendants who, although they don't have an agent for service of process, are amenable to service, accept service and come in and defend.

THE COURT: I think that they do.

MS. ROTHSCHILD: I think that they do not view in the context of a, of this situation, I don't think that they declare such a statute as the type that I have hypothesized to be unconstitutional.

THE COURT: Justice Blackmun's opinion says as follows. "It is true, of course, that respondents had little or no trouble locating this particular, well known defendant-petitioner, but the tolling provision is premised on a reasonable assump-

tion that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve."

MS. ROTHSCHILD: Well, I don't think that [27] statement means that if you drew a statute which provided for the unrepresented foreign corporation who is not easy to find and serve, such as the statute as it exists now, but excepted and gave the benefit of the statute of limitations to those who not only are easy to serve but who voluntarily come in and defend, then that would not be unconstitutional under any decision of the Supreme Court.

THE COURT: How does a plaintiff do that? How do you draft a statute like that in the first place and, secondly, how do you put a plaintiff in a position where they have to know whether they are dealing with someone that's easy to serve or someone that's difficult to serve?

MS. ROTHSCHILD: Doesn't the plaintiff have an obligation to, with reasonable speed and diligence, after discovering that he has a cause of action, to file a complaint? Isn't that the basis of the statute of limitations, to protect against the prejudice that may occur generally, as a general matter, by the disappearance of witnesses and staleness of evidence?

THE COURT: All the legislature is trying to do here is to put the plaintiff and the [28] defendants on the same playing field, and it has to be level. It can't be uneven. And what they're trying to do is saying let's make it a level playing field and let the plaintiff have the same chance of suing a foreign tort-feasor as they do a resident tort-feasor.

MS. ROTHSCHILD: That's right, but this statute doesn't do that. What this statute does is give the plaintiff, balances it in favor of the plaintiff because the plaintiff here can sit on his cause of action, vis-a-vis a foreign corporation that is well known to him, that has been in this state defending cases, the same kinds of cases, and playing settlements and judgments for the last eight or ten years, can sit on that cause of action simply because that foreign corporation has not designated an agent, has not done a ministerial act of designating a agent for service of process.

THE COURT: That's an argument that has been raised and found wanting in two cases, Velmohos, and in the Searle case.

MS. ROTHSCHILD: But no, because those two cases were challenged under equal protection and due process grounds. But the Supreme Court found [29] under commerce clause constraints that the argument which wasn't advanced in those two cases and which would have succeeded was sufficient.

Your Honor has argued that there is a difference between—

THE COURT: I'm not arguing anything. I'm asking questions.

MS. ROTHSCHILD: Your Honor last posited that there may be a difference between service of process and acceptance of jurisdiction.

THE COURT: Sure.

MS. ROTHSCHILD: And that there is nothing in the statute which specifically waives a defendant by appointing an agent to—waives the claim that there's no personal jurisdiction. It seems to me that that argument is as highly speculative and devoid of statutory support as the argument that was addressed by the Sixth Circuit, and while we have the representation of the Attorney General's office that that is in fact what he or she does, there certainly is no statutory support one way or the other to say that.

And although your Honor has suggested that perhaps by designation of an agent you don't waive [30] your right to assert lack of in personam jurisdiction, the very nature of the agency concept is that the Secretary of State or whomever it is that you appoint is your alter ego for accepting service of process, and by accepting service of process it is at least evidence of, if not a waiver, and I don't necessarily concede that it's not a waiver, that you accept.

That's not like being slapped with a summons as you drive up the New Jersey Turnpike. That is your agent and alter ego to accept service of process. Even if it's not a waiver, it's certainly evidence of a submission to the jurisdiction of this state whether or not you would be subject to the jurisdiction

of this state under the minimum contacts theory had you been served under the long arm statute somewhere else.

So I think that there is an intrusion, if there's a choice that the defendant must make, and that really in most cases the way that you come in and contest personal jurisdiction is that you are served under the long arm statute and make a special appearance for the purpose of contesting jurisdiction, and so it permits you to come into court and not waive, by coming into this state, [31] any defenses that you have, but for the ability to make a special appearance you would have to come in, and once you come in, I think historically it has been been the rule that you have submitted to the jurisdiction of the court.

By appointing an agent, your agent to accept service of process, I think that there is a reasonable argument that can be made that you have done that there too. I don't suggest that the defendants I represent necessarily have a good argument regarding minimum contacts. But if we are to view the statute as it applies generally, I am virtually certain that there are defendants out there who do. But in the context of these defendants, I think that there is a statute that can be drawn that would not infringe on commerce clause considerations and would be sustainable under the protection and due process clauses.

As some of us have recently learned, it doesn't take much to sustain a statute or a court made rule under the equal protection and due process clauses, and I don't think that there would be anything in the less intrusive statute that I described that would change that.

The last point that I would like to address [32] is that I think that the phrase highly speculative and devoid of statutory support in the Sixth Circuit case is equally susceptible to the interpretation that what is highly speculative and devoid of statutory support is the assertion that the defendants may do this, that is, appoint an agent for service of process and thereby avoid that Catch 22

THE COURT: Can I just read to you a footnote from Justice Steven's dissent in the Searle case? Mind you, he's dissenting.

"I do not understand the court to be holding that New Jersey has a legitimate interest in attempting to require all corporations to submit in all cases to the jurisdiction of its courts, and that discrimination against unregistered foreign corporations is justified by the state's desire to accomplish this purpose. Since a state may not enact a law that prohibits a foreign corporation from asserting a due process defense to an exercise of personal jurisdiction by a state court, I do not believe that the state may justify a classification that disfavors unregistered foreign corporations on the ground that they refused to take action that would [33] accomplish the same purpose."

MS. ROTHSCHILD: As your Honor correctly pointed out, we now have dicta in a dissent, and I am not sure how persuasive that would be in the face of a challenge to a statute which—

THE COURT: Well, that's what he's saying the majority is saying. He is saying that the majority is saying that they are not construing the tolling statute by denying a foreign corporation the right to contest in personam jurisdiction. That's the whole court. He's merely making an observation as to what the entire court seems to agree on.

MS. ROTHSCHILD: But that's not in the context of a statute which requires you to appoint an agent for service of process in order to take advantage of the statute of limitations. I don't know that he would say that when we're dealing with that type of a statute.

THE COURT: Thank you. I'm going to decide the motion today, although I reserve the right to file a formal opinion in the event of an appeal.

It is my view that the Bendix case is not binding on the courts of this state. I find that the facts of that case are distinguishable from [34] the facts of the current case. The Ohio statute seems to be very similar to the first statute promulgated in the state which the Coons-1 opinion found to be wanting under the interstate commerce clause, that is, the Ohio statute in effect required licensure as well as the registration of an agent to effect service of process in order to toll

the Ohio statute of limitations. That, in effect, was the problem with our first statute in New Jersey.

The first analysis I suppose is whether this statute interferes with interstate commerce to the point that it is unconstitutional. And we are recommended by case law to apply either the per se test or the balancing test to that question. It is suggested, I think, even in the Bendix case, that the per se rule should not be applied where it is clear on the face of the statute that the legislature has not intended to prefer its state economically over that of another state, or where the undeclared intent of a statute is not to prefer the home state economically over a foreign state.

And I think the tolling statute, although it clearly has impact on out of state [35] corporations, is not designed to favor either defendants or plaintiffs within the state over out of state defendants. First of all, it affects out of state persons, that is individuals, and out of state corporations. So it's not aimed simply at commerce conduct.

Secondly, it doesn't favor either defendants or plaintiffs in the forum state. As I indicated before, it's my view that this statute simply places all the parties on the same level playing field and gives the plaintiff the opportunity to serve a tortfeasor who is a resident of New Jersey the same way that he would serve a non-resident defendant, that is, it simplifies the service of process only and makes everyone equal in that respect.

The question then is, and I think that the legitimate state interest involved in this statute has been so well addressed and decided by Velmohos and by the Cohn versus Searle case that I'm just going to jump right over it and go to the question of whether under the balancing test, since we have legitimate state interests that are being advanced by the statute, whether there is a less intrusive way of impacting on interstate commerce but [36] accomplishing the same state goals and results.

It would appear to me that this amendment to the statute was obviously taken from the legislative point of view of meeting the constitutional infirmities of the prior statute, and

the legislature was attempting to find the least intrusive way of doing it.

And all a foreign corporation need do in order to gain the benefit of our statute of limitations is to designate an agent for the service of process by filing a paper. I believe that if this court were to adopt the Bendix opinion to this current statute there would be no way a legislature in the United States could pass a tolling statute that would comply with the interstate commerce clause.

In my view, it is incorrect to make the observation that by requiring someone to file a piece of paper designating an agent for the purposes of service you are consenting to the in personam jurisdiction of the forum state. That I think is a fatal analysis of the Sixth Circuit. Service of process and in personam jurisdiction are distinct questions, and I think clearly the organic law permits a defendant to come before the [37] forum court and say you don't have jurisdiction over me on the typical due process grounds that are always advanced in questions of jurisdiction. And I think that's clearly suggested by the Supreme Court of the United States in the Cohn versus Searle case, not only by the majority, but also by the dissent.

And I think that it's unnecessary to require a state legislature to say to get the benefit of our statute of limitations you have to file a piece of paper designating an agent for service of process and, by the way, just to remind you, you do have a constitutional right to contest in personam jurisdiction under the due process clause of the United States Constitution. I just think that's unnecessary, and that is, as I perceive this argument, to be the only criticism of the New Jersey statute, save the fact that no tolling statute whatsoever will meet constitutional muster in the United States, and I find it difficult to believe in view of the fact that the United States Supreme Court in the Cohn versus Searle case has enumerated several reasons why they think the states have a legitimate interest in protecting their citizens by passing a [38] tolling statute. So it seems to me by reading the Cohn decision that the United States Supreme Court was not saying

there is no tolling statute that can ever be passed that would not meet constitutional muster.

For those reasons I find the New Jersey tolling statute not be a burden on interstate commerce and not to be a violation of the United States Constitution.

On the collateral issue of laches, I agree that the Cohn case seems to suggest that in order to pass the equal protection clause muster, laches would have to be an affordable defense in order for foreign defendants to be treated fairly in terms of the possibly prolonged time between accrual of the cause of action and institution of suit. But laches is an affirmative defense. The defendant has the burden of proving not only an undue delay in terms of filing the complaint, but also the presence of real prejudice by reason of the delay, and you have to differentiate in toxic tort cases the real problems that result because of the latency of asbestos related diseases from the prejudice that results by reason of the plaintiff waiting seven years from the time of [39] diagnosis until the filing of suit. There has to be some affirmative showing by the defendant that there is real factual prejudice. I see none in this record and, therefore, I cannot grant the defendant's motion which is a partial summary judgment motion. I deny the motion on laches without prejudice to explore it further factually at the time of trial or before, but right now I have no record to base any finding of prejudice.

Any questions?

MR. TORTORETI: Your Honor, I'm assuming that our motion for summary judgment on the statute of limitations grounds is granted.

THE COURT: The motion is granted.

MR. TORTORETI: And the cross motion in all regards is denied because you think the cross motion also addressed the statute of limitations.

THE COURT: Yes.

MR. TORTORETI: Thank you.

MS. ROTHSCHILD: Thank you, your Honor.

THE COURT: The Order, however, should reflect that I have simply denied the motion on the defense of laches without prejudice.

MR. TORTORETI: I understand that.

[40] CERTIFICATE

I, STANLEY GRABON, C.S.R. # XI00377, an Official Court Reporter of the State of New Jersey do hereby acknowledge that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings to the best of my ability.

/s/ STANLEY GRABON

STANLEY GRABON, C.S.R.
OFFICIAL COURT REPORTER

[1] SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY
DOCKET NO. L-045449-87

DOMINICK ARMENTI and THERESA ARMENTI,
his wife, *et al.*,

Plaintiffs,

—v.—

CAREY CANADA, INC., *et al.*,

TRANSCRIPT OF MOTION

Middlesex County Courthouse
New Brunswick, New Jersey
Friday, September 16, 1988

TRANSCRIPT ORDERED BY:
Roseann Lynn Brenner, Esq.

APPEARANCES: WILENTZ, GOLDMAN & SPITZER, ESQS.
BY: ALAN M. DARNELL, ESQ.,
For the Plaintiffs.

[2] MCCARTER & ENGLISH, ESQS.
BY: GITA F. ROTHSCHILD, ESQ.,
For the Asbestos Claims
Facility Defendants.

GOLDFEIN & JOSEPH, ESQS.
BY: ROSEANN L. BRENNER, ESQ.,
For the Defendants A.C.L. & Bell.

CARY EDWARDS, ATTORNEY GENERAL
OF N.J.
BY: HARRY HAUSHALTER, ESQ.,
Deputy Attorney General,
For the Intervener.

June Andrian, C.S.R.
License X100362
Middlesex County Courthouse
P.O. Box 964
New Brunswick, N.J. 08903

[2] THE COURT: Armenti versus Carey Canada, Inc. et al., docket number L-45449-87.

Counsel, enter your appearances.

MS. BRENNER: Roseann Brenner for A.C.L. and Bell.

MS. ROTHSCHILD: Gita Rothschild for the Asbestos Claims Facility defendants.

MR. DARNELL: Alan Darnell for the plaintiff Armenti.

MR. HAUSHALTER: Attorney General's Office, intervener.

THE COURT: As indicated on the card that has been provided to me by my staff, this is a motion granting defendants relief from the Court's order of June 2, 1988, granting plaintiff's motion for partial summary judgment and denying defense' cross motion for summary judgment.

MS. BRENNER: That's correct, your Honor.

THE COURT: Basically what was the order that was granted at that time?

MS. BRENNER: Judge Keefe entered an order granting plaintiff's motion for partial summary judgment in effect striking defendants' defense of statute of limitations to the claim brought by a Dominick Cortese.

Defendants had cross claimed to plaintiff's motion because plaintiff had initiated the question of the constitutionality of the New Jersey tolling statute in their moving brief and the defendants picked up the ball [3] obviously and ran with it, and we challenge the constitutionality of N.J.S.A. 2A:14-22 which is the New Jersey Tolling Statute which tolls the Statute of Limitations to defendants and unrepresented foreign corporations who are not present in the State and cannot be served in the State, and provides for a designation of an agent to make them represented in the State. In other words,

all they have to do is file a designation with the Secretary of State to be considered present in the State.

THE COURT: All right. As I understand it, the basis for the rehearing so to speak of that motion is defense counsel's position that U.S. Supreme Court case of Bendix held the similar Ohio statute unconstitutional.

MS. BRENNER: That's correct.

THE COURT: The New Jersey statute should be unconstitutional.

MS. BRENNER: Your Honor, this case was initiated in 1987 under the title captioned Armenti, but Dominick Cortese is a plaintiff in this case. He brought this in 1987 for asbestos related which was diagnosed and freely admits in '80. That's the defense of the statute of limitations that he waited seven years to bring a suit. Therefore, that's the basis of our defense for the statute of limitations. Defendants submit plaintiffs had filed their motion for partial summary judgment to strike that [4] defense based on the New Jersey tolling statute.

If I may, in the process of giving procedure, I think it's important to give the Court just a brief history of the statute itself because there was a predecessor to this statute which the New Jersey Supreme Court declared unconstitutional because it did not provide for the designation of an agent. In order to designate an agent you had to register to do business. They considered that a forced licensor provision and therefore an impermissible burden on interstate commerce.

THE COURT: That's Coons 1.

MS. BRENNER: That's Coons 1. The burden was found to be to enable a defendant to get the benefit of the statute of limtations you were forced to register to do business and they considered that an impermissible burden for a foreign corporation to undergo. Now, there was also Coons 2 which held that was prospective and not retroactive in effect.

Defendants contest the constitutionality or contested before Judge Keefe on the basis that the current amended statute because the legislature after Coons 1 amended the New Jersey tolling statute to provide for a designation procedure where they didn't have to register to do business. They responded

directly to what the New Jersey Supreme Court did. The looked at the decision and [5] said okay, this is unconstitutional because we're making them registered business. Let them file notice with the Secretary of State to designate an agent. Therefore, it takes that burden from them, so the legislature did that. That brought in the current tolling statute.

Defendants then came and contested the constitutionality of that statute before Judge Keefe on the basis that statute is unconstitutional because it requires a defendant, an unrepresented foreign corporation who does not intend to be bound to the general jurisdiction or consent to the general jurisdiction of New Jersey, to designate an agent to accept service of process in New Jersey thereby consenting to the general jurisdiction. We contend that that was, in fact, a violation of the commerce clause. We also contend it violated equal protection and due process, and the crux of the argument and what the Sixth Circuit Bendix opinion and the United States Supreme Court opinion dealt with was the commerce clause. What I'm going to address only today is obviously the commerce clause.

We contended before Judge Keefe that, in fact, was not constitutional because it forced the defendant to choose between being liable forever to any claim brought by a New Jersey resident or waive personal jurisdiction in New Jersey which is something that A.C.L. and Bell do not want [6] to consent to the personal jurisdiction of New Jersey, and they find that an impermissible burden on interstate commerce since they are exclusively foreign corporations engaged in such.

Now, we relied also on the Bendix opinion which is a Sixth Circuit opinion. The Court in Bendix had ruled that an Ohio statute which stated that the statute of limitations was tolled as to defendants of corporations who were not present in the State it was tolled until they did become present in the State. It was a tolling provision for the statute of limitations if you're not present. To be present in Ohio you had to designate an agent.

The Sixth Circuit determined that that, in fact, was a violation of the commerce clause in that we essentially argued the

same thing to Judge Keefe in that they forced a foreign corporation to decide between being liable forever and not getting the benefit of the statute of limitations or submitting to get that benefit they would just have to waive personal jurisdiction, the right to contest personal jurisdiction.

Judge Keefe—this is obviously prior to the United States Supreme Court decision—Judge Keefe determined that the Bendix decision was not, in fact, binding upon himself or New Jersey Courts because the Ohio statute and New Jersey statute were distinguishable in that the Ohio [7] statute required in order to appoint an agent you would have a licensing procedure as the original New Jersey Statute had, and he stated that since the current New Jersey tolling statute allowed you to designate an agent, that they were distinguishable and that therefore he was not bound by what the Sixth Circuit said in Bendix.

He went a little further and stated that he considered the fatal flaw in Bendix—another reason why he wouldn't follow Bendix—the Bendix Court held that by designating an agent you waive the right to contest in personam jurisdiction. He felt that that was incorrect. He stated that one can't waive the right to contest personal jurisdiction. That was an organic right. We disagreed then and we still disagree with that.

THE COURT: Is there anything new by way of argument that you have that you didn't have before Judge Keefe?

MS. BRENNER: Yes. It all interchanges. That's why I'm giving you everything.

THE COURT: Okay.

MS. BRENNAN: If that's permissible to the Court.

THE COURT: Go ahead.

MS. BRENNAN: The Court has the papers. The Court is aware Judge Keefe also held that the statute did not apply to commerce because it affects individuals as well as foreign corporations. Therefore, he stated that he looked [8] to the Supreme court holdings in Velhmohos, New Jersey Supreme Court, and G.D. Searle, United States Supreme Court, where they challenged due process.

The Supreme Court stated that the prior New Jersey Statute was constitutional even though it required a license or

provision because the State had legitimate interest in protecting claims of its interest in locating hard to reach defendants and so he stated the Supreme Court found a legitimate State interest. I adopt that legitimate State interest. The current statute is simply trying to put everybody on the same ballfield. Therefore, there's no discrimination in in versus out of State people or corporations.

He went forward. He felt there was no other statute that could pass constitutional muster but for New Jersey's current tolling statute. Our motion for a cross summary judgment was denied and plaintiff's was granted. He upheld the constitutionality. Shortly thereafter, a matter of two or three weeks, the United States Supreme Court ruled on the Bendix decision, affirmed the Sixth Circuit. They found the Ohio statute which required the designation or appointment of an agent to be an impermissible burden on interstate commerce in that it forced by appointing an agent, it forced an unrepresented foreign corporation to submit to the general jurisdiction of the [9] States Courts for all actions.

The Court went further to discuss how a State statute which requires or conditions an ordinary legal defense such as the statute of limitations, which we all know is not a right but an ordinary legal defense, that if they condition that or take it away from an out of State defendant as opposed to an in State defendant, and that defendant was involved in commerce, then that statute would be reviewed under the commerce clause. They also stated that a statute which requires a corporation to appoint an agent . . .

(There is a pause.)

THE COURT: May I suggest you confer with counsel for a moment on that point?

MS. ROTHSCHILD: If I may be heard briefly.

THE COURT: Why don't you confer for a moment.

(There is a pause.)

MS. BRENNER: Excuse me. I apologize for the momentary blank on my part.

THE COURT: That's all right.

MS. BRENNER: The Court stated that any State statute that requires a foreign corporation to designate it agent, to accept service, and the corporation—excuse me.

(There is a pause.)

THE COURT: All right. You want to pause at this moment and let someone else speak or do you want to come [10] back to that point?

MS. BRENNER: If I can have one second to bring my thoughts together. I do believe this is a rather complicated issue because it involves so many different aspects and it's causing some difficulty in relating it to the Court.

THE COURT: You want me to take a short break?

MS. BRENNER: Could we? Would that be permissible, your Honor?

THE COURT: I'll do that.

(There is a recess.)

MS. BRENNER: If I could resume, your Honor. The Supreme Court in Bendix examined the Ohio statute. They stated that a statute that is acceptable or State interests that are acceptable under equal protection and due process clause, those interests may not be acceptable under the commerce clause or sufficient under the commerce clause to attain constitutionality for a particular statute. They did, in fact, refer to G.D. Searle in their opinion in Bendix. They stated yes, it's true a State has a definite interest in protecting a plaintiff, in trying to alleviate the burden on a plaintiff who must go the extra measure to serve an unrepresented defendant in an action in a given State, and that for those reasons a statute which would deny an ordinary defense or take away someone's [11] limitation period would, in fact, be constitutional. It passes equal protection, your Honor, because there's sufficient interest in the State.

They stated in this particular Bendix case that a State cannot justify a statute which takes away an ordinary legal defense or conditions it on a waiver of a right such as personal jurisdiction cannot be justified when you can, in fact, reach the foreign defendant, the unrepresented foreign defendant, by a long arm statute. They said this is not an acceptable State interest or sufficient State interest to permit the

deprivation or the withdrawal of an ordinary legal defense and condition that defense on a right that the party would otherwise have, an individual liberty interest that they would have.

The Court went further to say that when a statute requires an unrepresented foreign defendant to designate an agent to accept service of process or lose the statute of limitation, they are in effect making that defendant who designates an agent subject to the general jurisdiction of that particular State. They said, as they concluded throughout this entire opinion, this is an unacceptable and impermissible burden, totally unreasonable, and doesn't pass under the commerce clause. It's unconstitutional.

Now, I do believe that when Judge Keefe distinguished Bendix, he was distinguishing it on the basis that we had a [12] provision where you designate an agent by notice, and Ohio had a provision where you designate that agent because you had to register to do business and appoint an agent. The Supreme Court in Bendix is clear and reiterates throughout the entire opinion that if you designate or appoint an agent you are consenting to the general jurisdiction of that State and that is an unreasonable burden on commerce.

Now, plaintiff claims that the Supreme Court found the Ohio statute unconstitutional because it had no provision for the designation of an agent for service of process, for the sole and exclusive purpose of extricating a punitive defendant from the tolling provision.

We submit respectfully to the Court that the Supreme Court found the designation of an agent which subjects a foreign corporation to the general jurisdiction of the State, that was unreasonable. They made it clear the statute which requires foreign corporations to designate an agent to accept service would fall under the commerce clause because the act of designation of an agent itself, regardless of the method, whether it's by notice, whether it's by licensing, by registering to do business, regardless, that notice in and of itself results in the submission to the general jurisdiction of the forum. As I stated, and I don't want to repeat myself, the Court didn't

distinguish the forum in which you designate that [13] agent, whether it be by notice or by registering.

Plaintiff contends further that the New Jersey tolling statute allows for the foreign corporation to file a notice to designate an agent as opposed to the licensor in provision of Coons 1 to gain the benefit of the statute of limitation and that this provision makes it unconstitutional. Again that's not what the Supreme Court has ruled and the Supreme Court never even addressed remotely any distinction as to how you designate an agent. They state it clearly, just plain and simply, you designate that agent, you've consented to jurisdiction.

There are abundant Supreme Court opinions that speak to the issue of waiving or consenting to the general jurisdiction of the Court. One such opinion is the Insurance Corporation of Ireland, Ltd. v Campaign DES Beuxite, cite 456 United States 694. It was argued in the Third Circuit. Certiori was granted. It was decided on June '82, wherein the Supreme Court stated a defendant who takes advantage of certain State procedures can, in fact, consent by taking advantage of those procedures to the general jurisdiction of that State's Courts.

It went further to state that plaintiffs can take behavior or historic fact of a defendant's behavior and argue that they have consented to the jurisdiction of the Court by their behavior whether it be voluntary or in-[14]voluntary. Therefore, I throw that in to buttress my argument that the Supreme Court considers any designation of any agent of a foreign corporation to accept service of process to submit that foreign corporation to the general jurisdiction of a particular forum.

THE COURT: Let me just ask you this while you're pausing there a moment. If the statute were to say or were to be interpreted to say that designating or naming an agent submitted the defendant to jurisdiction of the Court but that the defendant could then argue that the Court did not have in personam jurisdiction, would that change things at all?

MR. BRENNER: Under the Supreme Court's ruling, which is Bendix, I don't believe it would. I believe by the mere vir-

tue of your appointing that agent, whether or not you can go in and argue later, you've already put someone there to accept your service and consent to the jurisdiction of that State, the Supreme Court, and also there's no statutory provision which permits the Secretary of State to accept such a designation number one. Number two, we don't know that that's proper. Number three, it's my feeling that your Honor is looking to the law which calls on the Court to interpret a statute constitutionally if it is at all possible, and this is one of the reasons why I gave you all that history about Coons 1. [15] The legislature did, in fact, intend for the statute to be constitutional. There's no question about that. What they tried to cure in their amendment was the burden of registering of every foreign corporation registering to do business, not the burden that the Supreme Court has found in a similar statute of consenting to the general jurisdiction of the State.

We submit and we firmly urge the Court that no matter what kind of designation you file, you have just created your consent to the general jurisdiction of the State and any suit can go and pick up a piece of paper and regardless of your designation say here, they filed this. They've consented to the jurisdiction. I have a cause against them. You have jurisdiction. I do believe the Supreme Court rulings, the Insurance Corporation of Ireland case, state that defendant's action, regardless if you try to limit it, is only a piece of paper, and the Secretary of State accepts it without statutory support, I might add, that you still consent to the general jurisdiction of the Court.

THE COURT: Miss Rothschild, is there anything you wanted to add to the argument?

MS. ROTHSCHILD: I'll be very brief, your Honor. Stated very simply, the reason we're back in court talking about this statute is because the Supreme Court in Bendix [16] said that Judge Keefe was wrong when he said that a tolling statute which merely required the appointment of an agent for service of process was constitutional.

Your Honor has now asked whether if the statute were interpreted to permit a party to come in later and argue that there was no in personam jurisdiction would it then be con-

stitutional and I believe your Honor is alluding to the Attorney General's argument that they, in fact, have been permitted in the case of Cassiar Asbestos Company a limited designation. I believe he attached a copy of that limited designation to his papers and the limited designation saying they are only designating an agent for service of process in order to receive process but that they in no way consent to the jurisdiction of the Court.

THE COURT: Let me stop you right there. Actually I had asked the question if the statute actually said that, or the Court interpreted the statute that way, what would the Bendix effect be?

MS. ROTHSCHILD: I think if the statute actually said that, we might be on weaker ground under Bendix because Bendix itself says the suggestion that Midwesco had the simple alternative of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Initially there is no statutory support for either [17] option and so the Supreme Court is troubled by the fact that the statute itself does not provide for a limited designation and so I think it would make a difference here were such statutory support for a limited designation. I would feel more comfortable representing my clients and advising them to file such a limited designation if I could point to the tolling statute and say, you see, it really is okay. The legislature says so. You are not submitting to the general jurisdiction of the Court.

Now the Attorney General says there is no statutory support but we have done it and look here. Here's the case of Cassiar. And I say, number one, Cassiar apparently is taking its chances as to how that limited designation will be interpreted by the many Courts in New Jersey. Number two, that hasn't been tested yet. I don't believe that Cassiar has come forward on a motion for summary judgment asserting the statute of limitations where they have said, listen, we filed this designation so that we could take advantage of the statute and here we are, we want to take advantage of the statute, and there hasn't been any kind of a legal determination about whether or not that, in fact, operated to exclude them

from the provisions of the tolling statute which I think is the reason why the Supreme Court was looking for statutory support, so I think, yes, there would be a difference.

[18] THE COURT: Okay.

MR. HAUSHALTER: May it please the Court, I think we have an issue that for us, one, attempting to decide what the Supreme Court in Bendix really says, I don't think the Supreme Court in Bendix really dealt with our statute. I don't think the Supreme Court in Bendix is telling your Honor how to rule in this case.

We have a statute. It's a different statute than what we have in Ohio. Our statute does not require the designation of an agent as part of the process of registering to do business. The Ohio statute did and that's why in the Ohio statute you had no limitation with regard to the nature of representation. When you register to do business you have to go through the entire routine that is involved with that procedure, including the representation or designating of an agent for general jurisdiction. We don't have that requirement.

Our statute was amended after Coons 1 specifically to allow unregistered corporations to designate an agent for purposes of service of process. The statute does not say that that's for purposes of designating an agent for general jurisdiction. It is silent on that. We maintain that we have a policy, the Secretary of State has a policy of accepting the designations which are limited, namely, to the point where the foreign corporation is saying to New [19] Jersey and to New Jersey plaintiffs for service of process this is our agent but only with regard to those types of actions where there is due process minimial contact. That is the way our statute now has to be interpreted in order to make it constitutional. There's no question about that. That is one thing that Bendix does tell us.

We maintain that is, in fact, an appropriate viable way of interpreting our statute and that's the way the statute must be interpreted. If it is not we have no tolling statute. We have no tolling statute unless our position is sustained by the Court because there is nothing else the legislature can do. If our interpretation, the way we are indicating the statute

should be interpreted is unconstitutional, then the fundamental right of a legislature to enact a tolling statute is lost, but there is nowhere in Bendix where that is said. In fact, the Court in Bendix tried to indicate very clearly that if we have a system where the designation is limited and only establishes the designation for purposes of those actions which are based on the long arm aspect, then we have a constitutional designation, and that's all we are saying here today. That is the exact way we are indicating to the Court that statute should be interpreted, and so again we have nothing from Bendix that tells this Court that under our interpretation our statute is unconstitutional.

[20] Judge Keefe was absolutely correct. That is exactly what Judge Keefe said. He says he must interpret our statute so that the designation of the agent is limited only with regard to causes of action which have minimum contact in this State. There's nothing that Bendix said that indicates Judge Keefe is wrong. Judge Keefe is absolutely right. We agree with Judge Keefe. His position is even stronger now because, in fact, what he has indicated is the way the statute must be interpreted in order for it to be constitutional.

We've indicated in our brief, your Honor, the established principles of construction that our Courts have utilized, namely, to attempt to interpret statutes so that they have a constitutional result, and clearly had our legislature known about Bendix would have made that statute clear. After Coons 1 our legislature came and very quickly enacted an amendment in order to make our statute constitutional.

The policy of the State is very, very clear and that's noted also in the Coons 2 decision and in the Searle decision by the Third Circuit. The policy that this State has with regard to attempting to have a viable tolling statute and all of that supports an interpretation that we are seeking this Court to sustain.

MR. DARNELL: Your Honor, I'll do my best to be [21] brief. I agree with everything Mr. Haushalter has said to the Court. I'd like to add in Coons 1 our Supreme Court of New Jersey said that the old tolling statute violated the commerce clause because it required a waiver of one's jurisdictional

defenses as part of the licensor provisions and therefore exacted too much of a burden and therefore violated the commerce clause. Bendix doesn't say much different. It says the Ohio statute they interpreted requires the same thing.

What we're faced with is a question of statutory interpretation. We are not in Ohio. We are in New Jersey. In New Jersey we've already gone through the process that was alluded to in Bendix of statutory support. The first statute was said to be unconstitutional in Coons 1. Our legislature passed a new statute in response to that.

In response to the statement by the Supreme Court of New Jersey that you cannot constitutionally have a statute that requires a waiver of jurisdictional defenses as a condition of appointing an agent for service of process, it was clearly the intent of the legislature who was invited by the Supreme Court to give it another try. It is set forth in the statutory history that is at one point set forth at page 5 of the Attorney General's brief. There was no doubt, there can be no doubt, that the legislature [22] intended to pass a constitutional statute. If passing a constitutional statute means it must be interpreted so as not to require a waiver of jurisdiction then sobeit. That's what the legislature wanted as set forth in the legislative history.

Had the statute said by appointing such service of process a corporation hereby expressly waives any jurisdictional defenses and expressly subjects itself to jurisdiction, we might be in a different situation though even then this Court could do judicial surgery on the statute as is allowed as was done by the Supreme Court of New Jersey in the Chamber of Commerce case that's referred to in the briefs. In any event, as I said before, we're not in Ohio. We're in New Jersey. The change have been made to the statute, and to interpret the statute as the defendants request would require this Court to look for a way to find it unconstitutional which would be completely contrary to the mandates of our Supreme Court which is you look for a way to find the statute to be constitutional.

Because we're basically dealing with statutory reconstruction and interpretation, I don't believe that the Bendix case

restricts this Court in any way, shape or form from construing a New Jersey statute, which statute has never been construed by the Supreme Court of the United States. To the contrary, in Velmohos the Supreme Court [23] sent it back to the Supreme Court of New Jersey to construe what they found to be—maybe they sent it back to the Third Circuit—an opaque comment in Velmohos as to whether or not our previous statute required a waiver of jurisdictional defenses; that by some fortuitous path of appellate history ended up in the Coons 1 case.

So, I think that based on what I've said it's clear as could be that the legislature intended to pass a constitutional statute; that they passed the new statute, the statute under attack here, in response to the statement of Coons that you can't have a statute that requires waiver of defenses. And to read this statute to require such a waiver is to go against the well-established rules of statutory construction and would be in direct disagreement with the way that Judge Keefe interpreted this very same statute in June of 1988. Thank you, your Honor.

THE COURT: Is there anything you wanted to say further?

MS. ROTHSCHILD: Yes. I think that the Attorney General and Mr. Darnell both concede that but for the Attorney General's statement that a limited designation will be accepted. Bendix requires the New Jersey statute to be declared unconstitutional because Bendix says whatever the difference is between the Ohio statute and the New Jersey statute, even if the mere appointment of an [24] agent for service of process was the only thing that a foreign corporation had to do, it would be unconstitutional because it would be a submission to the general jurisdiction of the Court.

Mr. Haushalter has said we understand that Bendix requires that we accept limited designations so there's nothing more the legislature could do in passing a statute. We're accepting limited designations and that makes it okay under Bendix. The answer is there is more the legislature could do. It could provide the statutory support that the United States Supreme Court was looking for for that kind of an act, and the Supreme Court was unhappy that it wasn't in the Ohio

statute, that kind of assurance, and it would be equally unhappy that it's not in the New Jersey statute.

THE COURT: I think I've heard sufficient argument unless somebody has a new point to raise.

MS. ROTHSCHILD: Your Honor, it is actually new. I would like to respond to Mr. Darnell's comments about Coons 1 and the basis upon which the New Jersey Supreme Court did evaluate the original New Jersey statute as unconstitutional. I have the opinion right here, page 318. The question is whether the denial of the statute of limitations defense to an unlicensed foreign corporation forces that corporation to obtain a license. That was the burden [25] that the Court found. The New Jersey Supreme Court found the burden to be forcing them in order to get the benefit of the statute of limitations to register to do business. They tried to do indirectly what they couldn't do directly, number one.

Number two, I think it's important for the Court to note the Supreme Court stated quite clearly in the third paragraph from the end of its opinion that a State interest to protect the plaintiffs to have viable claims against unrepresented foreign corporations isn't sufficient, period, where you have a long arm statute and you can reach that defendant.

It's clear they reached A.C.L. and Bell within days of filing the Complaint through the long arm service. There's no question but that they could have in 1980 obtained service on these defendants. The Supreme Court says you can't have a tolling statute that takes away ordinary defenses unless you give up a right. I think the Supreme Court is saying you can't do that. That's unconstitutional, and no matter what you do to a statute, whether you let them file a paper, yes, you notice the designation as opposed to licensing, it's unconstitutional, period. That's all I wanted to say.

MR. HAUSHALTER: May I respond to that because I think that's a twist that was not initially noted. That [26] statement is somewhat inaccurate and misleading with all due respect to counsel. The Supreme Court made a balancing analysis and said that this public policy that the State has to allow plaintiffs to file suit against these unrepresented foreign corporations is outweighed when the tolling statute requires the

foreign corporations to submit to the general jurisdiction of the State. That's the key. The balancing under that factual analysis goes for the defendants and goes against the tolling statute. What we're saying is we have a new balancing approach, your Honor. Our balancing approach is the policy of the State versus forcing these foreign corporations to come in and only submit to limited jurisdiction. Under that balancing approach, your Honor, the statute should be sustained and I think that's where Bendix is not applicable because Bendix doesn't deal with that analysis. Thank you, Judge.

MS. BRENNER: If I may, there is no statutory support in New Jersey statutes for any limited designations. Thank you.

THE COURT: All right. On this motion the issue really is what the effect of the Supreme Court Bendix opinion has on our statute of limitations which is N.J.S.A. 2A:14-22 which reads in pertinent part, where a person is not represented in this State by any person or officer upon whom summons or other original process may be served, **[27]** therefore they shall not be computed as part of the time period within which a statute can be started. And in the final paragraph it states, "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process."

The Court finds that this statute was amended in response to the Coons 1 decision which held that the prior statute was unconstitutional because it required the foreign corporation to submit to the jurisdiction of the court. I believe that the Attorney General, Mr. Haushalter, has correctly stated the law when he says the Court, when deciding constitutionality of the statute, has the right and the duty to interpret it in such a manner that would remain constitutional if that is the intended purpose of the legislature. He argues further in effect that the legislature's quick response to the Coons 1 decision indicates that they, the legislature, were attempting to pass a statute that would be constitutional. I accept that argument also.

The question then remains does the naming or designating of a representative by the notice required by Statute N.J.S.A.

14-22 to accept service of process eliminate the right of a defendant to contest to personal jurisdiction. The statute doesn't say it does. The **[28]** Court has a right to perform judicial surgery so to speak. I will avail myself of that right and I will interpret the statute to read that there is no waiver by the foreign corporation in providing the notice under the statute. There is no waiver of the right of that foreign corporation to contest service of process and to contest in personam jurisdiction. In view of that I find the statute to be constitutional and therefore the motion is denied.

I hereby certify that the foregoing is a true and accurate transcript of proceedings as taken stenographically by me at the date and at the place hereinbefore set forth.

/s/ JUNE ANDRIAN, C.S.R.
June Andrian, C.S.R.
OFFICIAL COURT REPORTER

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-1642-89T3

MOTION NO. M-6197-89

Before Part: Q

Judges: HAVEY AND STEIN

CHERYL A. DIFALCO

—VS.—

SUBARU OF AMERICA, INC. et al.

ORDER ON MOTION

MOTION FILED: July 6, 1990

ANSWER FILED: July 18, 1990 BY: Attorney General

SUBMITTED TO COURT: July 30, 1990

ORDER

This matter having been duly presented to the court, it is on this 31st day of July, 1990, hereby ordered as follows:

Motion by appellant Takata Corporation for Leave to Appeal is GRANTED.

SUPPLEMENTAL:

[STAMP
Illegible]

FILED
APPELLATE DIVISION

AUG 6 1990

[Illegible]
Clerk

FOR THE COURT:

JAMES M. HAVEY

James M. Havey J.A.D.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-6247-89T3F

CHERYL A. DIFALCO

—VS.—

SUBARU OF AMERICA, INC. et al.

SCHEDULING ORDER

An appeal having been filed in the above-captioned matter,

IT IS HEREBY ORDERED that the time for filing and serving transcript(s), briefs and appendices shall not be later than as set forth below:

(a) Transcript(s) (including Statement of Items Comprising the Record, where applicable): due September 6, 1990

(b) Brief and appendix of appellant: due September 6, 1990

(c) Brief and appendix (if any) of respondent (including, in case of cross-appeal, issues raised therein): due September 27, 1990

(d) Reply of appellant (including, where applicable, response to cross-appeal): due October 4, 1990

(e) Reply brief, if any, of respondent (only in case of cross-appeal):

IT IS FURTHER ORDERED that an original and four (4) copies of each brief shall be filed with the Clerk and within ten (10) days thereof a proof of service shall be filed with the Clerk indicating that two (2) copies of the brief and appendix

were served on each party to the appeal, and one (1) copy of the transcript was served on any one respondent for the use of all respondents; and

IT IS FURTHER ORDERED that in the event of default by appellant in filing the appellant's brief and appendix by the time directed or upon default of the appellant regarding any other provision of this order, THE APPEAL SHALL BE DISMISSED WITHOUT FURTHER NOTICE; and

IT IS FURTHER ORDERED that if any respondent fails to file a brief within the time directed by this order, such respondent shall be precluded from further participation in the appeal.

Witness, the Honorable Herman D. Michels, Presiding Judge for Administration, at Trenton, this 8th day of August, 1990.

pjl

Emille R. Cox
Acting Clerk

T-15
11/88

Original Filed
Nov. 2, 1988

CARY EDWARDS
Attorney General of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Harry Haushalter
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(609) 292-1527

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HONORABLE JOHN C. LIFLAND

Civil Action No. 86-5059(JCL)

PIERRE ROBINSON,

Plaintiff,

—v.—

VISUAL PACKAGING, INC., et al.,

Defendants.

AFFIDAVIT OF PAUL E. WERMUTH

STATE OF NEW JERSEY:

ss.

COUNTY OF MERCER:

PAUL E. WERMUTH, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an Attorney-at-Law licensed to practice in the State of New Jersey since 1976.

2. I have been employed by the Secretary of State of the State of New Jersey since 1982. During this period, I have served as legal advisor to the Secretary of State and have simultaneously been general manager of three of the Department's divisions, including the Division of Commercial Recording.

3. Particularly because of my supervisory responsibilities over the Division of Commercial Recording, I am familiar with the practices and policies of the Secretary of State regarding the recording of designations of agents by foreign, unregistered corporations.

4. As a result of an amendment to *N.J.S.A.* 2A:14-22 (*L.* 1984, *c.* 131), the Legislature permitted unregistered, foreign corporations to file with the Secretary of State a notice advising of the designation of a representative for purposes of accepting service of process as a means of avoiding the tolling of the statute of limitations.

5. Upon the advice of the New Jersey Attorney General, the Secretary of State permits the filing of designations by unregistered, foreign corporations of representatives for service of process only with respect to causes of action which have the minimal contacts for due process purposes in this State. Such designations are recorded by this office and insulate the foreign corporations filing such designations from causes of action which have no nexus with New Jersey.

6. Attached to this affidavit as Exhibit A and made a part hereof is a copy of a designation of a representative for service of process filed by Cassiar Mining Corporation (formerly Brinco Mining Limited) and recorded in the Secretary of State's office.

/s/ PAUL E. WERMUTH
PAUL E. WERMUTH

Sworn and Subscribed to
before me this 8th day
of September, 1988.

/s/ VIRGINIA LEE D'ERRICO

VIRGINIA LEE D'ERRICO
Notary Public of New Jersey
My Commission Expires
September 18, 1988

DESIGNATION OF AGENT PURSUANT TO
N.J.S.A. 2A:14-22

Cassiar Mining Corporation, (formerly named Brinco Mining Limited), a Canadian corporation with its principal place of business in Vancouver, British Columbia, Canada, hereby designates The Corporation Trust Company, 28 West State Street, Trenton, New Jersey 08608, as its representative in New Jersey to accept services of process in these suits, and only these suits, where Cassiar is properly subject to *in personam* jurisdiction under New Jersey's long-arm rule, R. 4:4-4.

This appointment of agent was authorized by resolution duly adopted by Cassiar Mining Corporation's Board of Directors.

By: /s/ [ILLEGIBLE] Title: Secretary

Date: September 25, 1985

FILED
Oct. 5, 1985
[Illegible]
Secretary of State

EXHIBIT A

MORLEY, CRAMER, TANSEY, HAGGERTY & FANNING, ESQS.
521 Green Street, P.O. Box 5555
Woodbridge, New Jersey 07095
(201) 634-7880
Attorneys for Defendant, TAKATA CORPORATION
Our File No. T-5489

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. W-019907-88

Civil Action

CHERYL A. DiFALCO,

Plaintiff,

vs.

SUBARU OF AMERICA, INC., FUJI HEAVY INDUSTRIES, LTD., and TAKATA CORPORATION

Defendant(s).

ORDER FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court on the Motion of Morley, Cramer, Tansey, Haggerty & Fanning, Esqs., attorneys for defendant, Takata Corporation, for an Order granting Summary Judgment, and the Court having had opportunity to review all moving papers and any papers filed in opposition thereto, and for good cause shown;

IT IS on this 21st day of June, 1990,

ORDERED that motion is denied.

IT IS FURTHER ORDERED that a copy of this Order be duly served and filed on all parties within seven (7) days of receipt by movant of a copy of this executed Order.

/s/ [Illegible], J.S.C.

[Illegible], J.S.C.